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82-498

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1982

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NO. _____

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MRS. AAGE LASSE ALVESTAD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF AAGE LASSE ALVESTAD, AND THEIR MINOR DAUGHTER,

Petitioners

V.

MONSANTO COMPANY,
MONSANTO OIL U.K., INC.,
DOLPHIN INTERNATIONAL, INC.,
AND
DOLPHIN INTERNATIONAL, S.A.,

Respondents

- - - - - - -

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

- - - - - - -

BENTON MUSSLEWHITE
609 Fannin,
Suite 517
Houston TX 77002
(713)222-2288

Counsel for
Petitioners

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Fifth Circuit court of appeals decision in this case – in holding that an appeal, wherein the notice of appeal is untimely filed, may be considered only where the appellant, in not filing a timely notice, relies upon the express statements, as distinguished from implied statements or other actions, of the trial judge that the appellants' post-judgment motions were timely filed – is contrary to the holding and/or rationale of the landmark Supreme Court decisions of Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 321 U.S. 215 (1962) and Thompson v. Immigration and Naturalization Service, 375 U.S. 394 (1964) and is in conflict with such cases from other circuit courts as Pierre v. Jordan, 333 F.2d 951 (9th Cir. 1964) cert. den. 379 U.S. 974; Vine v. Beneficial Finance Co., 374 F.2d 627

(2nd Cir. 1967) cert. den. 389 U.S. 970; Govt. of Virginia Island v. Gereau, 603 F.2d 438 (3rd Cir. 1979); United States v. Calzada, 579 F.2d 1358 (7th Cir. 1978); and Estate of Butler's Tire & Battery Co., Inc. v. Ferrous Financial Services, 592 F.2d 1028 (9th Cir. 1979), thus calling for a grant of writ of certiorari or per curiam reinstatement of this appeal.

II.

Whether the holding of the court of appeals in this case – in refusing to apply the Harris/Thompson rule even though the Petitioners failed to file notice of appeal within 30 days in complete reliance upon the statements and actions of the district court, at the time it heard the Petitioners' post-judgment motions, in admitting that when it rendered summary judgment it was not aware that motions to defer and notices of deposition had been pending; in admitting it was aware of Petitioners' approaching

30-day (the next day) deadline, thus indicating that if it were going to rule against Petitioners it would rule by the next day; and in considering Petitioners' motions solely upon their merits, without any contention by it or Respondents that they were untimely - is contrary to Harris, Thompson and the decisions from circuit courts other than the Fifth Circuit, and so far departs from the accepted course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision through grant of writ of certiorari or per curiam reinstatement of this appeal.

III.

Whether the failure of the court of appeals, on motion for rehearing, to correct its miscalculation of the date notice of appeal was filed (within 60 days of judgment) and to deem the notice and/or Rule 60(b) (F.R.C.P.) motions (both of which were also filed within such 60-day

period) to constitute motions for an extension of time in which to file notice of appeal pursuant to Rule 4(a)(5), F.R.A.P., is so contrary to the decisions of the various circuit courts of appeal, such as Estate of Butler's Tire & Battery Co., Inc. v. Ferrous Financial Services, supra; Witt v. Merrill, 208 F.2d 285 (4th Cir. 1963); Stirling v. Chemical Bank, 511 F.2d 1030 (2nd Cir. 1975); Alley v. Dodge Hotel, 501 F.2d 880 (D.C. Cir. 1974); and Sanchez v. Dallas Morning News, 543 F.2d 556 (5th Cir. 1976), and so far departs from the accepted course of judicial proceedings, as to call for the exercise of the Supreme Court's power of supervision through the grant of writ of certiorari or per curiam reinstatement of this appeal.

IV

Whether the refusal of the court of appeals to hold that the district court at least

slightly abused its discretion in denying Petitioners' Rule 60(b) motions – despite the fact that the errors of the district court were clear and self-evident, such as failing to reset the summary judgment hearing date, to compel answers to interrogatories, to require affidavits or sworn testimony in support of the summary judgment, and to require the Respondents to clearly identify an alternative foreign forum wherein all Respondents were amenable to process and an adequate remedy was available to Petitioners; despite the fact that Petitioners did not utilize the Rule 60(b) motion as a substitute for appeal (indeed, the motion was filed before the appeal time ran) but was utilized to allow the court to correct its self-evident and clear mistakes without having to resort to the expensive and time-consuming appellate process; that Petitioners filed the motions

within a reasonable time after judgment, one within 30 days, the other within 60 days; that the Petitioners' rights were terminated by dismissal motion, prior to having received a hearing on the merits; that no intevening inequities or prejudice developed in favor of Respondents; and that the equities, giving Rule 60(b) the liberal application it is supposed to have, clearly favor granting Rule 60(b) relief – conflicts with such Supreme Court authorities and authorities from circuit courts, as Klappnott v. United States, 335 U.S. 601 (1948); Compton v. Alton Steamship Co., 608 F.2d 96 (4th Cir. 1979); Radack v. Norwegian American Line Agency, Inc., 318 F.2d 538 (2nd Cir. 1963); Meadows v. Cohen, 409 F.2d 750 (5th Cir. 1969); and Seven Elves v. Eskenazi, 635 F.2d 396 (5th Cir. 1981), and so far departs from the accepted course of judicial proceedings, and so far sanctions such a departure by the district court, as to call

for exercise of the Supreme Court's power of supervision through the grant of writ of certiorari or per curiam remand to the court of appeals for consideration of the appeal on its merits.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE DISTRICT COURT AND CIRCUIT COURT

Petitioners:

Mrs. Aage Lasse Alvestad, Individually and as Representative of the Estate of Aage Lasse Alvestad, and their Minor Daughter

Respondents:

Monsanto Company
Monsanto Oil U.K., Inc.
Dolphin International, Inc.
Dolphin International, S.A.

SPECIAL NOTE OF REFERENCES

For convenience, Monsanto, Inc., a Delaware corporation, will be referred to as "Monsanto"; Monsanto Oil U.K., Inc., a Delaware corporation, will be referred to as "Monsanto U.K."; Dolphin International, Inc., a Texas corporation, will be referred to as "Dolphin U.S."; Dolphin International, S.A., a Panamanian corporation, will be referred to as "Dolphin S.A."

SUBJECT INDEX

	Page
Questions Presented for Review -----	i
List of All Parties to the Proceedings in the District Court and Circuit Court ---------	viii
Special Note of References ---------	ix
Reference to Official and Unofficial Reports of Opinions Delivered by Courts Below ----------	1
Grounds on Which the Jurisdiction of this Court is Invoked --------	2
Constitutional Provisions, Statutes and Rules Which This Case Involves ----------	2
Statement of the Case ----------	3
A. Course of the Proceedings Below and Facts and Procedural Events Relevant to Reasons for Issuance of Writ ----------	3
B. Basis for Federal Jurisdiction in the District Court ----------	15
Reasons Relied on For the Allowance of Writ ----------	16
I. ----------	16
II. ----------	28
III. ----------	33
IV. ----------	39

SUBJECT INDEX (continued)

Page

Conclusion and Prayer ---------- 45

LIST OF AUTHORITIES

Cases	Page
Addickes v. S. H. Kress & Company, 398 U.S. 144 (1970)	42
Alley v. Dodge Hotel, 501 F.2d 880 (D.C. Cir. 1974)	iv,29
Bane v. Spencer, 393 F.2d 108 (1st Cir. 1968)	44
Bass v. Hoagland, 172 F.2d 205, cert. den. 338 U.S. 816	41
Coleman v. Checker Taxi Company, 325 F.2d 853 (7th Cir. 1962)	44
Compton v. Alton Steamship Co., 608 F.2d 96 (4th Cir. 1979)	vi,25,27,40
Dallas v. Long Manufacturing, Inc., 561 F.2d 613 (5th Cir. 1977)	44
Dredge Corporation v. Penny, 338 F.2d 456 (9th Cir. 1964)	41
Estate of Butler's Tire & Battery Co., Inc. v. Ferrous Financial Services, 592 F.2d 1029 (9th Cir. 1979)	ii,iv,29
Enochs v. Sisson, 301 F.2d 125 (5th Cir. 1962)	40,43
Georgia Southern & F.Ry. Co. v. Atlantic Coast Line R. Co., 373 F.2d 493 (5th Cir. 1967)	40

LIST OF AUTHORITIES (continued)

Cases	Page
Govt. of Virginia Island v. Gereau, 603 F.2d 438 (3rd Cir. 1979) ----	ii
Gulf Oil v. Gilbert, 330 U.S. 501 (1953) ----------	26,43
Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962) ----------	i,iii,30
Hernandez-Rivera v. Immigration & Naturalization Service, 630 F.2d 1352 (5th Cir. 1980) ---	29,34
Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (Sup. Ct. 1976) ----	44
Hovey v. Elliott, 167 U.S. 215 (1897) ----------	27
Illinois State Employees Union Council 34, AFL-CIO v. Lewis, 473 F.2d 561 (7th Cir. 1972)-----	44
Kibort v. Hampton, 538 F.2d 90 (5th Cir. 1976) -----	40,41
Klappnott v. United States, 335 U.S. 601 (1948) ----------	vi,40
Lauritzen v. Larsen, 345 U.S. 571 (1953) ----------	43
McDowell v. Celebrezze, 310 F.2d 43 (5th Cir. 1962) -----	27,29,30,37
Meadows v. Cohen, 409 F.2d 750 (5th Cir. 1969) ----	vi,40

LIST OF AUTHORITIES (continued)

Cases	Page
National Screen Service v. Poster Exchange, Inc., 305 F.2d 647 (5th Cir. 1962) ----	42
Needham v. White Laboratories, Inc., 102 S.Ct. 427 denying cert. in re 639 F.2d 394 (7th Cir. 1981) ----------	14,36,37
Norfolk Monument Company, Inc. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 704 (1969) ----------	42
Offshore Company v. Robison, 266 F.2d 769 (9th Cir. 1959) ----	5
Piper Aircraft Company v. Reyno, 103 S.Ct. 252 (1981) ----------	26,43
Parrish v. Board of Commissioners, Alabama State Bar, 533 F.2d 942 (5th Cir. 1976) ----	44
Pierre v. Jordan, 333 F.2d 951 (9th Cir. 1964), cert. den. 379 U.S. 974 ---------	i,34,35
Radack v. Norwegian American Line Agency, Inc., 318 F.2d 539 (2nd Cir. 1963) ----	vi,40
Stirling v. Chemical Bank, 511 F.2d 1030 (2nd Cir. 1975) ---	iv,29
Sanchez v. Board of Regents of Texas Southern University, 625 F.2d 521 (5th Cir. 1980) ----	30

LIST OF AUTHORITIES (continued)

Cases	Page
Sanchez v. Dallas Morning News, 543 F.2d 556 (5th Cir. 1976) ----	iv,14,29
Season-All Indus., Inc. v. Turkiye Sise Ve Cam Fabrik, A.S., 425 F.2d 34 (3rd Cir. 1970) -----	41
Seven Elves v. Eskenazi, 635 F.2d 396 (5th Cir. 1981) ----	vi,25,39
Spinks v. Chevron, 507 F.2d 216 (5th Cir. 1975) ----	5
Terassi v. South Atlantic Lines, 226 F.2d 823 (2nd Cir. 1955) ----	30
Thompson v. Immigration & Naturalization Service, 375 U.S. 384 (1964) ----------	i,iii,33
Tuley v. Heyd, 492 F.2d 788 (5th Cir. 1974) ----	30
United States v. Calzada, 579 F.2d 1358 (7th Cir. 1978) ---	ii
United States v. Lewis, 522 F.2d 1367 (5th Cir. 1975) ---	30
United States v. Schilling Ford, 568 F.2d 1106 (5th Cir. 1978) ---	30
Vine v. Beneficial Finance Co., 374 F.2d 627 (2nd Cir. 1967), cert. den. 389 U.S. 970 ---------	i,36
Windsor v. McVeigh, 93 U.S. 914 (1876) ----------	40
Witt v. Merrill, 208 F.2d 285 (4th Cir. 1953) ----	iv,29

LIST OF AUTHORITIES (continued)

Cases — Page

Wolfson v. Hankin,
376 U.S. 203 (1964) ---------- 33

Bridoux v. Eastern Air Lines, Inc.,
214 F.2d 207 (D.C. Cir. 1950) ---- 25,40

Texts

Wright: Law of Federal Courts,
Section 99 (2nd Ed. 1970) ------

LIST OF APPENDICES

Appendix 1 - Memorandum and Order - August 20, 1980

Appendix 1A- Final Judgment - August 20, 1980

Appendix 2 - Order - September 22, 1980

Appendix 3 - Order - December 16, 1980

Appendix 4 - Decision of United States Court of Appeals, Fifth Circuit, April 1, 1982, as reported at 671 F.2d 908, et seq.

Appendix 5 - Denial of Petition for Rehearing and Suggestion for Rehearing En Banc - May 17, 1982

Appendix 6A- Excerpt of Amendment XIV, Constitution of the United States

Appendix 6B- Excerpt of Rule 4, Federal Rules of Appellate Procedure

Appendix 6C- Excerpt of Rule 26, Federal Rules of Appellate Procedure

Appendix 6D- Excerpt of Rule 12, Federal Rules of Civil Procedure

Appendix 6E- Excerpt of Rule 56, Federal Rules of Civil Procedure

Appendix 6F- Excerpt of Rule 59, Federal Rules of Civil Procedure

Appendix 6G- Excerpt of Rule 60, Federal Rules of Civil Procedure

LIST OF APPENDICES (continued)

Appendix 7 - Excerpts of Motion to Reconsider Order of the Court Dismissing Cause of Action and To Reinstate Cause of Action and Motion to Grant a New Trial Pursuant to Rules 59 and 60 of F.R.C.P.

Appendix 8 - Excerpts of Motion of the Plaintiffs for Relief from the Final Judgment of this Court dated August 20, 1980, Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure and for Relief Under the General Power of this Court to Rescind its Orders and Judgments and Reinstate a Cause of Action and Grant Further Relief

Appendix 9 - Notice of Appeal - Oct. __, 1980

Appendix 10- Letter from Louis R. Koerner, Jr. to Randy McClanahan - February 18, 1980 - re agreement to pass submission date of 2/29/80

Appendix 11- Motion to Defer Determination of Defendants' Motions to Dismiss under Rule 12b of F.R.C.P., on Grounds of Forum Non Conveniens and on Grounds of Limitations - August 6, 1980

Appendix 12- Notice of U.S. District Court Clerk Jesse E. Clark that Plaintiffs' Motion to Defer Determination on Defendants' Motions to Dismiss under Rule 12b F.R.C.P., on Grounds of

LIST OF APPENDICES (continued)

Appendix 12 (continued)- Forum Non Conveniens and on Grounds of Limitations, filed August 11, 1980, is placed on Court's Written Motion Docket for September 1, 1980

Appendix 13- Notice of U.S. District Court Clerk Jesse E. Clark that Plaintiffs' Motion to Reconsider Order Dismissing Cause of Action and Motion to Reinstate and Motion to Grant a New Trial is placed on Court's Written Motion Docket for Oct. 6, 1980.

Appendix 14- Notice of filing of Plaintiffs' Motion to Compel Answers to Interrogatories by Murray L. Harris, Clerk, U. S. District Court, Eastern District of Texas, Sherman Division

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY COURTS BELOW

1. The initial judgment and opinion of the district court was rendered on August 20, 1980 in Cause No. H-79-1883, in the United States District Court for the Southern District of Texas, Houston Division (unreported). Said judgment and order is attached as Appendix 1.

2. After the Petitioners filed a motion under Rules 59 and 60 of F.R.C.P., the district court, on September 22, 1980, issued an order denying said motion. Said order is attached hereto as Appendix 2.

3. After the Petitioners filed a second motion for relief under Rule 60(b), F.R.C.P., the district court once again, on December 16, 1980, issued an order denying such relief. Such order is attached as Appendix 3.

4. The judgment and order of the United States Court of Appeals for the Fifth Circuit, dated April 1, 1982, is reported at 671 F.2d 908. The opinion and judgment of the Court of Appeals is attached as Appendix 4.

5. The order of the United States Court of Appeals, Fifth Circuit, denying Petitioners' Petition for Rehearing and Rehearing En Banc, dated May 17, 1982, is attached as Appendix 5.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals was entered on April 1, 1982 (App. 4). A timely Petition for Rehearing and Rehearing En Banc was denied on May 17, 1982 (App. 5). The jurisdiction of this Court is invoked under 23 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH THIS CASE INVOLVES

This case involves directly and indirectly the construction and application of the

following constitutional provisions, statutes and rules of procedure: Amendment 14 to the Constitution of the United States; Rules 4(a)(5) and 26(a), F.R.A.P.; and Rules 12(b)(1), 56, 59 and 60(b), F.R.C.P. These all are reprinted in pertinent part and attached as Appendices 6A-6F.

STATEMENT OF THE CASE

A. Course of Proceedings Below and Facts and Procedural Events Relevant to Reasons for Issuance of Writ.[1/]

1. This case was filed by Mrs. Alvestad on behalf of herself, the estate of her husband, and her daughter (hereinafter "Petitioners"), alleging that while her husband, a diver, was working as a seaman onboard the vessel BORGNEY DOLPHIN, he was killed as a result of the negligence of

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1/ The course of proceedings below and facts necessary to argue the issues are, for the sake of brevity, combined because they are very similar, the issues being primarily procedural and constitutional.

Monsanto, Dolphin U.S., Dolphin S.A. and/or Monsanto U.K. (hereinafter "Respondents"), through the conduct of their agents, servants and employees, and as a result of the unseaworthiness of said vessel. Mr. Alvestad was Norwegian. The Petitioners alleged the vessel was controlled by one or more of the Respondents and that the accident occurred in the British sector of the North Sea (Rec., pp. 1-14, 159-171). The Petitioners sought recovery under the Jones Act, 46 U.S.C. 688, the general maritime law, and the Death on the High Seas Act, 46 U.S.C. 720 (Rec., pp. 9, 10). Suit was filed within three years of the date of the accident but over two years following said date.[2/]

[2/] All Respondents sought dismissal on the ground that the Death on the High Seas statute of limitation applied because this suit was filed more than two years, but less than three years, after the accident in question. The district court held, and we agree with its holding, that suit under the Death on the High

2. All Respondents filed motions to dismiss on the grounds foreign law and the doctrine of forum non conveniens should apply (Rec., pp. 186-88, 172-75, 196-99, 189-90, 114-18). However, they never clearly asserted which foreign forum they contended was an alternative forum; and did not attach affidavits or submit any evidence in support of their motions (see entire Record, and Rec. 172-175, 196-199, 189, 190).[3]

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[2] (continued) Seas Act, 46 U.S.C. 720, et seq, is barred. Since the district court recognized that the Jones Act (46 U.S.C. 688) claim of Petitioners was not barred (the Respondents did not contend it was), the question of limitations will not be hereafter mentioned because the district court implicitly recognized that one or more of the Respondents could be the Jones Act employer of the decedent pursuant to Spinks v. Chevron, 507 F.2d 216 (5th Cir. 1975) and Offshore Company v. Robison, 266 F.2d 769 (5th Cir. 1979).

[3] Respondent Monsanto did attach a general and conclusory affidavit to a motion which was prematurely filed (Rec. 27, 28) and, for such reason, was disregarded

3. Interrogatories aimed at eliciting evidence relative to the forum non conveniens motions were submitted to the Monsanto Respondents but they refused to answer most of them (Rec. pp. 57-58, 68-98). Thereafter, the Petitioners filed a motion to compel answers to unanswered interrogatories (Rec., pp. 57-58). In its "Memorandum Brief in Response to Plaintiffs' Motion to Compel Answers to Interrogatories", Monsanto admitted the unanswered interrogatories were obviously intended to develop information relevant to the choice-of-law and forum non conveniens questions (Rec. p. 64). The court notified all parties of the motion to compel and that it would be submitted and decided unless an oral hearing was immediately requested by either party (2nd Supp. Rec., App. 14). No oral

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3/ (continued)
by the district court (Rec., id.); in any event, that affidavit only applied to Respondent Monsanto and not to the other Respondents, who filed no affidavit

hearing was requested; yet, the district court did not rule upon Petitioners' motion to compel prior to granting Resondents' motion to dismiss (see entire Record).

4. Because the district court had not ruled on Petitioners' motion to compel and the Respondents continued to refuse to answer the interrogatories and produce additional records, the Petitioners commenced efforts to obtain documents relevant to such issues from a non-party, Occidental Petroleum. The district court had placed the motions to dismiss on its motion docket for Feb. 18, 1980 (2nd Supp. Rec.), but the parties agreed and stipulated to pass that submission date pending receipt of the Occidental documents. They further stipulated that after the documents were obtained the parties themselves would seek

3/ (continued)
prior to the court's dismissal order of August 20, 1980 (see entire Record).

a new submission date from the court (Oct. 16 motion, Exhibit 5A, 1st Supp. Rec., p. 63).[4/]

5. The Petitioners were finally able to secure those documents in May 1980 and in June 1980 the Petitioners' then counsel (Mr. Louis Koerner) became involved in an extensive antitrust trial in Pennsylvania and turned the case over to the present lead counsel (Plts. Mot. to Reconsider; No. 64 on Docket Sheet, labeled "Loose in File"). The present lead counsel received and reviewed the file in July 1980 and on Aug. 6,

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4/ Cynthia Norris of Mr. Koerner's office wrote Defendants' attorney, Randy McClanahan, with carbon copy to all attorneys and the Cler, documenting the agreement of the parties "to pass the submission date of February 18, on the outstanding motions in the above-referenced cause until after production of (the) documents . . . after the production of documents, we will need to decide on a date for submission of the motions . . . by copy of this letter, I am advising the Court of our agreement . . ." (Exh. 5A, 1st Supp. Rec., p. 63; see App. 10).

1980, as a precautionary measure, filed a Motion to Defer Adjudication of Defendants' Motions to Dismiss, as well as notices of depositions of the corporate officers of the Respondents, to depose said officers on the matters of choice-of-law and forum non conveniens (Rec., pp. 221a-223 and pp. 224-226; see App. 11). The notices provided that the depositions would be taken on August 26 and August 27, 1980. On August 11, the district court notified all parties that the Petitioners' Motion to Defer had been placed on the court's written motion docket for September 1, 1980 (1st Supp. Rec., p. 86; see App. 12).

6. Therefore, Petitioners were shocked when the district court, without the parties having requested a new submission date for the motions to dismiss (as agreed by stipulation), without the court notifying the parties of a new submission date, without complying with Rule 56, F.R.C.P., or the

local rules concerning notice, without any warning to the parties that it was about to rule on motions to dismiss, and furthermore, leading the parties to believe that it would not act until Petitioners' Motion to Defer had been submitted and decided on September 1, precipitately entered an order on August 20, 1980, dismissing the Death on the High Seas claim as being barred by limitations and dismissing the Jones Act suit on grounds of choice-of-law and forum non conveniens (Rec., pp. 235-238; App. 1 and 1A).

7. Petitioners' counsel did not actually see the court's dismissal order until about September 4, 1980 (upon return from depositions out of the country). Believing the district court may not have realized that, when it ruled on August 20, 1980, the Motion to Defer was pending for hearing at a later date, and depositions were pending, the Petitioners, on September 10, requested a new trial pursuant to Rule 59 and relief

from the August 20 order pursuant to Rule 60 and sought other appropriate relief (Doc. 64, "Loose in File"; Rec., p. 238; these motions will be hereinafter referred to as the "Sept. 10 post-judgment motions"; see excerpts, App. 7). The district court indicated it deemed the Rule 59 motion timely filed because it set a hearing on such motions for October 6, 1980 (2nd Supp. Rec., see App. 13), which was more than 30 days after the August 20 dismissal order. Nevertheless, Petitioners sought a clarification and ruling prior to the passage of 30 days and the court finally agreed to hear the Sept. 10 post-judgment motions on September 18, 1980, the 29th day after the August 20 order (see affidavit attached to October 16 Rule 60(b) motion, Supp. Rec.).

8. At the hearing on September 18, the court stated it had not been aware of Petitioners' pending Motion to Defer and notice of depositions when it ruled on August 20; the court indicated that it

assumed that the Sept. 10 post-judgment motions were timely filed because it proceeded to consider nothing but the merits of the motions and neither the Respondents nor the court raised any questions concerning the motions being untimely; moreover, the court indicated its awareness that the deadline for filing an appeal was September 19; the Petitioners were thus led to reasonably believe one of three things:

(a) That the court would grant Petitioners' Sept. 10 post-judgment motions because of the pending motion to defer and notice of depositions at the time it entered the dismissal order; such action seemed almost certain, based upon the court's words and conduct at the hearing;

(b) That if the court was going to rule against Petitioners and did not do so before the next day, it was because the court deemed Petitioners' Sept. 10 post-judgment motions had been timely filed, thus suspending the running of appeal time; or

(c) That if the court was going to rule against Petitioners and did not believe Petitioners' Sept. 10 post-judgment motions had been timely filed, then it would most certainly rule the next day so that Petitioners could file timely notice of appeal (see

October 16 motion, 1st Supp. Rec., pp. 11-13, 55-56; see excerpts App. 8).

9. When the court did not rule on September 19, the Petitioners did not file a notice of appeal because they assumed that any question of untimeliness of the post-trial motions had been waived by Respondents; that timeliness had been assumed by the court; that the court would certainly rule in Petitioners' favor because of the court's comments at the hearing; and further because Petitioners were aware that this same court had previously taken the view that if Petitioners filed a notice of appeal, the court would lose jurisdiction to rule on the Petitioners' post-trial motions (October 16 motion, 1st Supp. Rec., excerpts App. 8; and see Dec. 16 order, App. 3). Faced with the horns of this procedural dilemma and potential trap, the Petitioners made the only reasonable choice they could make, particularly since the starkly unjust

procedural improprieties of the court had been made known to the court at the September 18 hearing, and the court had indicated by its response that it intended to do something about them: Petitioners awaited the decision of the district court.

10. Thus, Petitioners were again shocked when the court, after delaying its ruling until September 22, three days post-deadline for appeal, ruled against Petitioners (1st Supp. Rec., pp. 12-13, 55-56, 88; App. 2). The court's ruling was solely on the merits; it did not mention any untimeliness of Petitioners' post-trial motions (App. 2).

11. After the court's unexpected ruling, Petitioners filed on October 16, 57 days after the August 20 dismissal order, a motion for relief from said order "pursuant to Rule 60(b) . . . and for relief under the general power of this Court to rescind its order . . . and grant further relief" (see excerpts, App. 8). Petitioners then

filed a notice of appeal on October 20, within 60 days of the August 20 dismissal order[5] (see notice of appeal, App. 9).

12. On December 16, the court ruled, in connection with the October 16 Rule 60(b) motion, that Petitioners had filed "a proper notice of appeal (on October 20) from the Court's Order of Dismissal", and that, therefore, the court was "without jurisdiction" to consider the October 16 Rule 60(b) motion (see App. 3).

13. On January 9, 1981, Petitioners filed a notice of appeal from the December 16 order (1st Supp. Rec., p. 47).

14. The two appeals were consolidated and the court of appeals, without mentioning

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[5] Notice of appeal was filed Monday, October 20, 1980, 61 days after the judgment was signed. However, this was clearly within 60 days because the 60th day fell on Sunday. (See Rule 26a, F.R.A.P.; App. 6E); Sanchez v. Dallas Morning News, 543 F.2d 556 (5th Cir. 1956) and Needham v. White Laboratories, 638 F.2d 394 (7th Cir. 1981) cert. den. 102 S.Ct. 427.

or discussing the due process travesties which occurred when the district court precipitately granted the Respondents' dismissal motions without resetting them and notifying the parties it intended to rule, and after miscalculating the date the first notice of appeal (App. 8) had been filed, proceeded to affirm the district court on the ground that an appeal of the August 20 dismissal order had not been properly perfected and on the further ground that the district court had not abused its discretion in refusing to grant Petitioners' Rule 60(b) motions (See App. 4).

B. Basis for Federal Jurisdiction in the District Court.

The basis of jurisdiction in the district court was the Jones Act, 46 U.S.C. 688, the Death on the High Seas Act, 46 U.S.C. 720, et seq, and the general maritime law of the United States.

REASONS RELIED ON FOR THE ALLOWANCE OF WRIT

I.

THIS CASE INVOLVES IMPORTANT CONSTITUTIONAL AND PROCEDURAL QUESTIONS WHICH HAVE ARISEN OUT OF THE MANNER IN WHICH THIS CASE WAS HANDLED BY BOTH THE DISTRICT COURT AND THE COURT OF APPEALS. PETITIONERS SIMPLY WERE NOT AFFORDED DUE PROCESS OF LAW – THEIR DAY IN COURT – AND THIS COURT SHOULD GRANT WRIT TO PREVENT A SERIOUS EROSION OF THAT INALIENABLE RIGHT.

The procedural improprieties in this case should be shocking to any judicial conscience. Any objective jurist will recognize how embarrassing it must have been to recount the occurrences in this case to the Norwegian attorney who referred it in the first instance. This Court must not tolerate the kind of judicial finessing which took place in this case. Mrs. Alvestad and her children were effectively denied the due process of our judicial system just as surely as if the doors of the courthouse had been closed to her when she attempted to file her original complaint. It is clear that the combination of the procedural

events and actions in both the trial and appellate courts thrust this case beyond the pale of fundamental fair treatment and so far departs from the accepted course of judicial proceedings as to clearly call for the exercise of the Supreme Court's power of supervision.

Why do we say all this? Here is why:

1. At the time the district court entered its order dismissing the Jones Act and general maritime law claims on grounds of forum non conveniens, it did so despite the facts that:

a. the Petitioners' motion to compel answers to interrogatories, which the Respondents themselves had admitted were relevant to the forum non conveniens motions, and which had been pending for several months, had still not been ruled on by the court (many months previously, the court had set submission of the motion to compel);

b. the Respondents had not attached or filed any sworn affidavits or proof in support of the very forum non conveniens motions which the court granted (and no depositions had been taken in connection therewith, nor any other form of sworn evidence was before the court, except Respondents' incomplete answers to Petitioners' interrogatories, which were wholly inadequate to form the basis of a disposition of the forum non conveniens motion for either party);

c. the Petitioners' motion to defer adjudication of the forum non conveniens motion, so that Petitioners could take the depositions of the Respondents' corporate officers with respect to the forum non conveniens motion on August 26 and 27, 1980, not only was still pending when the court precipitately granted the dismissal order on August 20, 1980, but the district court had, just prior to

August 20, set the motion to defer for submission on September 1;

d. And, most importantly, the parties had stipulated that, when the court had first set the forum non conveniens motions for submission in February of 1980, such submission would be passed from the February setting and reset, by agreement of the parties, at a later time, after discovery was completed; despite the fact that such stipulation had been sent to the court, the court did not reset the submission date, and did not give any notice, hint or warning to the parties that it was about to rule, even though it knew, or would have known had it bothered to look at the file, that discovery on the forum non conveniens motion was not even close to completion and the motion obviously was not ripe for a determination.

2. At the time the district court refused to grant the Petitioners' September 10 motion for new trial and/or relief pursuant to Rule 60, it did so despite the facts that:

a. it admitted at the September 18 hearing that it was not aware that Petitioners' motion to defer so as to permit the taking of depositions was pending and had already been set for submission twelve days after the court entered its dismissal order;

b. most, if not all, of the grave travesties listed in No. 1 above were discussed at the September 18 hearing;

c. it treated the September 10 post-judgment motions as if timely filed by its actions in setting the motions for submission after the 30-day appeal period had expired; by considering such motions solely on their merits; by subsequently holding that the notice of

appeal from its order denying the September 10 post-judgment motions was a proper notice of appeal (See App. 5); and by its words and conduct at the September 18 hearing;

d. it waited until three days after the 30-day post-judgment period had expired to deny the September 10 post-judgment motions even though it admitted at the September 18 hearing that it realized that there was only one more day left to run on that period and even though it knew that Petitioners were aware of its view that if Petitioners filed a notice of appeal the court would lose power to rule on the September 10 post-judgment motions (as the court ruled with respect to the October 16 post-judgment motions; App. 5); in other words, the district court knew of the procedural dilemma the Petitioners were faced with if it delayed its ruling beyond 30 days post-judgment.

3. The court of appeals refused to grant a rehearing with respect to its April 1 decision, holding that Petitioners' appeal from the August 20 order had not been properly perfected, despite the facts that it miscalculated the time in which Petitioners filed the October 20 notice of appeal and thus failed to mention or consider the rule adopted in the Fifth Circuit that a notice of appeal filed within 60 days post-judgment constitutes a Rule 4(a)(5) F.R.A.P. motion for extension of time in which to file a notice of appeal [6] and further failed to

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[6] Indeed, the court of appeals proceeded to excoriate Petitioners' counsel by erroneously assuming that no Rule 4(a)(5) motion had been filed within the 60 days post-judgment provided for in Rule 4(a)(5). The court of appeals stated:

> "If on September 18, one day before the running of her time for appeal, Mrs. Alvestad truly believed the district court to be favorably inclined toward her motions and close to an immediate ruling, she could have asked the court for an extension pursuant to Rule 4(a)(5). Even when the ruling did not issue until September 22, three days after her deadline was passed, she still had twenty-seven days under Rule 4(a)(5) in which to

mention the implied finding of the district court that good cause or excusable neglect did exist as reflected by its express holding that the October 20 notice of appeal was a "proper" notice;

6/ (continued)
ask for such an extension."671 F.2d. at 911. As pointed out infra, a notice of appeal filed within 60 days post-judgment does constitute a Rule 4(a)(5) motion and the fact that the court of appeals did not apply such rule was because it miscalculated the time in which the October 20 notice of appeal, alias a Rule 4(a)(5) motion, was filed is made apparent by the above language in the court's opinion as amplified by the following:

> "The district court entered its judgment dismissing Mrs. Alvestad's suit on August 20. She filed her notice of appeal on October 20, sixty-one days later and thirty-one days late." (Emphasis ours, 671 F.2d at p. 910).

The notice was not filed "thirty-one days late" because, as pointed out in footnote 5, the 60th day fell on a Sunday and therefore the filing on the 61st day must be deemed to have been filed within 60 days. Rule 26(a), F.R.A.P. (App. 6C).

4. The court of appeals refused to hold that the district court was guilty of "slight abuse" of its discretion in refusing Petitioners' Rule 60(b) motion and in so doing:

a. unbelievably ignored and never mentioned the serious and grievous improprieties of the district court in failing to set a hearing or give notice to the parties it was going to rule on the summary judgment motions; in granting the motions without any sworn proof having been filed in support thereof; in failing to grant Petitioners' motion to compel answers to interrogatories even though the motion had been pending for several months; and in failing to determine Petitioners' Motion to Defer before it granted the summary judgment even though it had set the motion to defer for a submission date after it granted the summary judgments;

b. ignored and did not mention the "slight abuse" rule, which applies where Petitioners had received no trial on the merits;[7]

c. ignored the fact that Respondents showed no prejudice which would be sustained by them should the court grant the Rule 60(b) motion;

d. failed to apply the consistent rule in other circuits, e.g. in the Fourth Circuit in Compton v. Alton Steamship Co., that "mistakes of law and fact" are grounds for granting relief under Rule 60(b)(1), F.R.C.P.;[8] that due prccess improprieties, such as failing

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[7] The court of appeals, in Seven Elves v. Eskenazi, stated:

> ". . . where denial of relief precludes examination of the full merits of the cause, even a slight abuse may justify reversal", 635 F.2d at p. 402, citing Bridoux v. Eastern Air Lines, Inc., 214 F.2d 207 (D.C. Cir. 1950).

[8] We just simply went into gross shock when we read the court of appeals' incredible comment that "(t)his case contains no . . . facially obvious error" (671 F.2d at p. 913).

to give notice, make a judgment "void" within the meaning of Rule 60(b)(4); and that the combination of all of the errors and improprieties of the district court in this case[9] would mandate the use of the "grand reservoir of the equitable power to do justice in a particular case",[10] provided for in Rule 60(b)(6);

e. and held that the Petitioners used the Rule 60(b) motion as "a substitute" for appeal, all the while ignoring the

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9/ Indeed there were numerous errors committed by the district court in passing upon the merits of the forum non conveniens motions, e.g., the district court failed to apply the very first principle announced by this court in Gulf Oil v. Gilbert, 330 U.S. 501 (1953) and Piper Aircraft v. Reyno, 102 S.Ct. 252 (1981) that the defendants-movants of a forum non conveniens motion must select a specific foreign forum (which they never did in this case) and show that they are amenable to process and that the plaintiffs have an adequate remedy available to them in that forum. The Respondents not only failed to make such a showing in the district court but when asked by the Fifth Circuit panel if they would stipulate to the jurisdiction of the English or Norwegian court, they declined to do so (See Defendants' post-argument briefs filed in the court of appeals).

fact that the Petitioners filed their first Rule 60(b) motion before appeal time had expired and utilized that procedure to "avoid wasting appellate resources on the perfunctory correction of obvious errors . . ."[11]

The foregoing outline of some of the more obvious improprieties in this case should make it obvious that the inexplicable treatment meted out to Mrs. Alvestad simply did not measure up to a fair, just and equitable consideration of her case in the American courts, within the context of the minimum requirements of properly applied rules of law, equity and procedure. As this Court stated in Hovey v. Elliott, 167 U.S. 215 (1897): "Can it be doubted that due process of law signifies a right to be heard . . .?"

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[10] Compton v. Alton Steamship Co., 608 F.2d at pp. 106-107.

[11] See McDowell v. Celebrezze, 310 F.2d 43 (5th Cir. 1962).

II.

WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS IGNORED AND FAILED TO FOLLOW A LINE OF AUTHORITIES, INCLUDING DECISIONS FROM OTHER CIRCUIT COURTS, WHICH ESTABLISH THAT THE FILING OF A NOTICE OF APPEAL OR MOTIONS WITH LANGUAGE SIMILAR TO THE BROAD ASSERTIONS CONTAINED IN PETITIONERS' TWO RULE 60(b) MOTIONS, ARE SUFFICIENT TO CONSTITUTE MOTIONS FOR EXTENSION OF TIME WITHIN WHICH TO FILE NOTICE OF APPEAL AS PROVIDED FOR IN RULE 4(a)(5), F.R.A.P.

Amended Rule 4(a)(5), F.R.A.P., provides that "the district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed for appeals from civil judgments". Rule 4(a)(5) thus provides 60 days in which to file a motion for extension of time for filing notice of appeal in civil cases.

The court of appeals assumed throughout its decision that no motion for extension of time to file an appeal had been filed [12]

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[12] The probable reason for this is the rank miscalculation by the court of appeals of the date by which the notice of appeal was filed. See footnote 6, supra.

and proceeded to ignore or reject, sub silentio, the decisions of other circuit courts, as well as decisions of its own circuit, which hold that a notice of appeal and other types of motions filed after the 30-day post-appeal period, but within 60 days following the judgment appeal from, as provided for in Rule 4(a)(5), will be construed to constitute motions for extension of time to file an appeal notice. See Estate of Butler's Tire & Battery Company, Inc. v. Ferrous Financial Services, 592 F.2d 1028 (9th Cir. 1979); Witt v. Merrill, 208 F.2d 285 (4th Cir. 1953); Stirling v. Chemical Bank, 511 F.2d 1030 (2nd Cir. 1975); Alley v. Dodge Hotel, 501 F.2d 880 (D.C. Cir. 1974); Hernandez-Rivera v. Immigration & Naturalization Service, 630 F.2d 1352 (9th Cir. 1980); Sanchez v. Dallas Morning News, 543 F.2d 556 (5th Cir. 1976);[13] McDowell v.

[13] Sanchez v. Dallas Morning News, supra, held the notice of appeal itself constituted a request for extension of time pursuant to

Celebrezze, 310 F.2d 43 (5th Cir. 1962); Sanchez v. Board of Regents of Texas Southern University, 625 F.2d 521 (5th Cir. 1980); United States v. Schilling Ford, 568 F.2d 1106 (5th Cir. 1978); United States v. Lewis, 522 F.2d 1367 (5th Cir. 1975); and Tuley v. Heyd, 492 F.2d 788 (5th Cir. 1974). Since the October 20 notice of appeal was filed within 60 days of the August 20 dismissal

13/ (continued)
Rule 4(a)(5), stating "although the record in this case does not disclose the making of such a motion (Rule 4a5 motion), the notice of appeal, which was filed within the extension period, permits the district court to entertain a request for an extension at a later date." Aside from the notice of appeal, the Court should note that the October 16 post-judgment motions are extremely broad and seek any relief the court might give, after reciting all the equitable facts that would constitute excusable neglect and/or good cause. Such motions should be construed to constitute a motion for an extension of time. McDowell v. Celebrezze, supra at 44; Terassi v. South Atlantic Lines, 226 F.2d 823 (2nd Cir. 1955), and the other authorities cited above.

order[14] and both the September 10 and October 16 post-judgment motions were also filed within 60 days of the August 20 dismissal order, the court of appeals should have, pursuant to the above authorities, retained jurisdiction over this appeal and either found that the December 16 order of the district court (finding that Petitioners had filed a "proper" notice of appeal when they filed the October 20 notice; see App. 3) constituted an implied finding of excusable neglect or good cause for an extension of time or remanded the case to the district court for a determination of whether or not excusable neglect and/or good cause existed for extending the time in which to file the notice of appeal.

What we do not understand is why – when we pointed out to the court of appeals, in our motion for rehearing and motion for rehearing en banc, that it apparently had

[14] See footnote 5, supra.

not realized that the 60th day post-judgment fell on a Sunday, thus making the notice of appeal, which constitutes a motion for extension of time in which to file notice of appeal, to have been timely filed – the court of appeals did not grant rehearing and take the action it should have. Having had the miscalculation brought directly to its attention and nevertheless refusing to correct its error, the only plausible conclusion we can reach is that the court of appeals just decided, for reasons it chose not to discuss, to go against the consistent holdings of the other circuit courts, and its own circuit court, and refuse to consider the filing of a notice of appeal within the 60-day period as tantamount to a timely filing of a motion to extend the time for filing a notice of appeal pursuant to Rule 4(a)(5). This Honorable Court should not tolerate this kind of unilateral defiance of the venerable doctrine of stare decisis.

III.

THE COURT OF APPEALS' REFUSAL TO APPLY THE HARRIS/THOMPSON RULE TO THE CIRCUMSTANCES OF THIS CASE IS CONTRARY TO SUPREME COURT DECISIONS IN HARRIS, THOMPSON AND WOLFSON, AND TO DECISIONS OF OTHER CIRCUIT COURTS SUCH AS THE NINTH CIRCUIT IN PIERRE V. JORDAN, THE SECOND CIRCUIT IN VINE V. BENEFICIAL FINANCE CO., THE THIRD CIRCUIT IN GOVT. OF VA. ISLAND V. GEREAU AND THE SEVENTH CIRCUIT IN UNITED STATES V. CALZADA, AND SO FAR DEPARTS FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

In Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962), Thompson v. Immigration & Naturalization Service, 375 U.S. 394 (1964), and Wolfson v. Hankin, 376 U.S. 203 (1964), the Supreme Court excused the appellant's failure to file a timely notice of appeal because of "unique circumstances" which consisted of two elements:

> (1) the party's affirmative action (similar to Petitioners' filing Rule 59 motion) which, if done properly, would have tolled the running of the appeal time; and
>
> (2) the party failed to file notice of the appeal within 30 days in reliance upon the conduct or actions of the parties and/or the court.

The court of appeals has erroneously given such rule an unreasonably narrow construction and has added new requirements which emasculate the meaning and intent of the Harris/Thompson rule. The court of appeals held that the rule can only apply where the court expressly states that the tardy post-trial motion is in fact timely (citing Hernandez-Rivera v. Immigration & Naturalization Service, 630 F.2d 1352 (9th Cir. 1980). Clearly, the court of appeals erred.

There are many cases wherein the action or conduct of the district court which justified application of the Harris/Thompson rule was not explicit and did not consist of an express statement that the post-trial motions had been timely filed. In Pierre v. Jordan, supra, the court dismissed the case in question on August 20, 1963, for lack of jurisdiction over the subject matter (similar to the ruling here). Thirteen days later the appellant moved to "vacate and

set aside the order of dismissal, and to reinstate the action." (The instant case is even stronger because Petitioners specifically filed a Rule 59 motion along with a Rule 60 motion). On September 27, 1963, the court entered an order denying the motion to vacate, it being recited by the court that it did not have jurisdiction over either the parties or the subject matter (nothing being mentioned by the court in the denial order that the post-trial motions were untimely, the same as occurred in this case). On October 7, 1963 (38 days after the order being appealed but only 10 days after the order of the court denying the appellant's post-trial motions), the appellant filed a notice of appeal. In Pierre, supra, the court made no representations to the appellant and there is nothing in the record in that case which indicates the court did anything overt; it simply considered and overruled the appellant's motion on its merits (as was expressly done

by the court in this case). The court of appeals reversed the district court and considered the appeal on the merits.

In Vine v. Beneficial Finance Co., supra, again the court did nothing "explicit". There, the parties agreed to an extension of time of an untimely filed motion and the court received such stipulation but did not sign it or take any "explicit" action in connection therewith and the appeal was allowed.

If there is any doubt concerning the present direction of the Supreme Court, see Needham v. White Laboratories, Inc., 102 S.Ct. 427 denying cert. in re 637 F.2d 394 (7th Cir. 1982). The Supreme Court, with only one dissent, denied certiorari on October 13, 1981, with respect to a court of appeals decision which liberally applied the Harris/Thompson rule.

The court of appeals in this case took the position that the Petitioners should

have filed a motion for extension of time in which to file a notice of appeal pursuant to Rule 4(a)(5) or filed a notice of appeal and then filed motion to remand in the court of appeals. However, these suggested procedures have been soundly criticized.[15/]

In any event, the actions of the district court in this case were more overt and justified greater reason for Petitioners to rely upon such action than the action of the courts in most of the cases granting relief under the Harris/Thompson doctrine. Here, the

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15/ In McDowell v. Celebrezze, supra, the court stated, "Second, it (granting Harris/Thompson relief) avoids the necessity for the anomalous action . . . out of an abundance of caution that a party 'take an appeal within the proper time and also file a motion in the district court and then ask the appellate court to authorize the district court to proceed and determine the motion'. Overburdened courts, trial and appellate, should not have to squander precious time and resources in such artificial maneuvers . . . ." (310 F.2d at 44; emphasis ours). Only one Supreme Court Justice considered the failure to file a Rule 4(a)(5) motion persuasive in a Harris/Thompson inquiry. See Justice Rehnquist's dissent to denial of certiorari in Needham v. White Laboratories, supra.

court clearly manifested, as much as if it expressly stated so, that it considered the post-trial motions timely filed; it set the hearing on the motions after the 30 days would have expired, thus indicating it considered the motions timely filed; at the hearing the court treated the motions solely on their merits, raising no question about their timeliness; the court decided the motions solely on their merits; the court, after having been reminded of the passing of the 30-day period, made statements indicating it would rule the next day or grant Petitioners' motion; and it later found that the initial notice of appeal had been "properly filed".

When these facts are coupled with the court's admission that it had not been aware of other pending motions and depositions when it granted the dismissal order and the court's position that if Petitioners filed a notice of appeal it would lose

jurisdiction over the post-trial motions, it becomes obvious that Petitioners' reliance upon the court's action in not filing notice of appeal on the 30th day was unquestionably reasonable. Indeed, it is obviously the better view to grant Harris/Thompson relief more readily to one who is making a bona fide effort to deal with a procedural trap than one who is acting out of total ignorance.

IV.

IN VIEW OF THE CLEAR AND SELF-EVIDENT MISTAKES OF LAW AND OTHER CIRCUMSTANCES JUSTIFYING RELIEF UNDER RULE 60(b), THE COURT OF APPEALS' AFFIRMATION OF THE DISTRICT COURT'S DENIAL OF PETITIONERS' RULE 60(b) MOTION IS CONTRARY TO MANY SUPREME COURT DECISIONS AND DECISIONS OF OTHER CIRCUITS, ALL AS CITED BELOW, AND SO FAR DEPARTS FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS, AND SO FAR SANCTIONS SUCH A DEPARTURE BY THE DISTRICT COURT, AS TO CALL FOR THE EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

At the outset, the court of appeals erred in failing to apply the "slight abuse" standard mandated in Seven Elves v. Eskenazi, 635 F.2d 396 (5th Cir. 1981), and contradicted numerous decisions of the Supreme Court in

trying to narrow the long accepted rule that either "mistakes of law" or "mistakes of fact" justify relief under Rule 60(b). Klappnott v. United States, 335 U.S. 601 (1948); Radack v. Norwegian American Line Agency, Inc., 318 F.2d 538 (2nd Cir. 1963); Bridoux v. Eastern Air Lines, Inc., supra; Compton v. Alton Steamship Co., 608 F.2d 96 (4th Cir. 1979); and Meadows v. Cohen, 409 F.2d 750 (5th Cir. 1969).

The most palpable, clear and self-evident "mistake" in this case is the court's failure to reset the hearing on the motions to dismiss, give notice to Petitioners and provide Petitioners with a genuine opportunity to prepare for and respond to the motions, and to be heard on a given date. There are several decisions which indicate that the kind of procedure employed in this case is the rankest of errors and, as stated in Windsor v. McVeigh, 93 U.S. 914 (1876), in effect makes the judgment "void". Kibort v. Hampton, 538 F.2d 90 (5th Cir. 1976); Enochs v. Sisson, 301 F.2d 125 (5th Cir. 1962); Georgia Southern & F. Ry. Co. v. Atlantic

Coast Line R. Co., 373 F.2d 493 (5th Cir. 1967); Bass v. Hoagland, 172 F.2d 205, cert. den. 338 U.S. 816; Dredge Corporation v. Penny, 338 F.2d 456 (9th Cir. 1964); Season-All Indus. Inc. v. Turkiye Sise v. Cam Fabrik, A.S., 425 F.2d 34 (3rd Cir. 1970).

In Kibort v. Hampton, supra, the defendants filed a motion to dismiss and for summary judgment and, as the court noted:

> "No hearing was noticed or requested in the motion. Without any further communications of record between the parties and the Court, on October 14, 1975 the Motion for Summary Judgment was granted," (538 F.2d at page 90).

Though the opposing party had been given 10 days' notice initially, the court of appeals held that the district court should have given the parties notice of a specific time by which it intended to rule, the court stating:

> "What the rule contemplates is ten (10) days advance notice to the adverse party that the matter will be heard and taken under advisement as of a certain day . . . here . . . there was no reason for Plaintiff to suspect that the Court was about to rule upon the motion. If the

> Plaintiff had been given notice (of a specific hearing date by the defendant or the Court), he may have submitted additional materials or moved for an extension of time to develop such materials through discovery."

The Court correctly reversed and remanded.[16/]

There are other legal mistakes of law which are just as "clear" and "self-evident" from the record and which demand relief under Rule 60(b):

> (1) the fact that no affidavit or sworn pleadings or evidence was filed in support of the Respondents' motions to dismiss "clearly" mandates that no summary dismissal or judgment be based thereon. See Norfolk Monument Company, Inc. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 704 (1969); National Screen Service v. Poster Exchange, Inc., 305 F.2d 647 (5th Cir. 1962); Addickes v. S. H. Kress & Co., 398 U.S. 144 (1970); and Wright, Law of Federal Courts, Section 99 (2nd Ed. 1970). These authorites require the defendant to produce sworn affidavits or testimony negating all the allegations of the plaintiff's complaints and conclusively establishing the defendants' right to the extremely drastic remedy of summary disposition;
>
> (2) The district court and the court of appeals decided foreign law should apply. However, they never decided which foreign law should apply. Moreover, the memorandum

and order and judgment granted an unconditional dismissal, without requiring the defendants to submit to the jurisdiction of the foreign alternative forum and waive any applicable statutes of limitation. Indeed, the defendants expressly refused, as indicated in their post-judgment briefs in the court of appeals, to do these things. Therefore, the judgment of both the district court and the court of appeals, on their face, violate the clear precept of such venerable decisions as Gulf Oil v. Gilbert, 330 U.S. 501 (1953); Lauritzen v. Larsen, 345 U.S. 571 (1953); and Piper Aircraft Company v. Reyno, supra, holding that a motion for forum non conveniens absolutely cannot be granted until the Court first determines that there is a particular "adequate alternative forum" in which all defendants are amenable to process and an adequate remedy is available to the plaintiffs. In this case, there is absolutely nothing in this record indicating or even implying that any of the four Defendants have an officer, office, assets, or agent for service in Norway, nor is there anything in the record to indicate or imply that Monsanto, Dolphin U.S., or Dolphin S.A. have an office, officer, assets, or agent for service in the U.K. While Monsanto U.K. may be amenable to process in England, it is not amenable to process in Norway. Moreover, there is absolutely no evidence in the record to indicate what the remedy for a potential plaintiff is in England or Norway so this Court can determine whether or not it is adequate;

(3) The district court granted the motions to dismiss without having ruled on the motion to compel, even though it had set

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16/ The same situation prevailed in Enochs v. Sisson, supra: "We do not think that the

the motion to compel for submission long before it ruled on the dismissal motion; even though there were other interrogatories and motion to produce documents pending which had never been responded to by the Respondents; and even though notice of depositions of corporate officers with respect to the grounds for the dismissal motions had been filed. These procedural improprieties are all "clear" error. See Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (Sup.Ct. 1976); Dallas v. Long Manufacturing, Inc., 561 F.2d 613 (5th Cir. 1977); Bane v. Spencer, 393 F.2d 108 (1st Cir. 1968); Coleman v. Checker Taxi Company, 325 F.2d 853 (7th Cir. 1962); Illinois State Employees Union Council 34 AFL-CIO v. Lewis, 473 F.2d 561 (7th Cir. 1972), cert. den. 93 S.Ct. 1364; and Parrish v. Board of Commissioners, Alabama State Bar, 533 F.2d 942 (5th Cir. 1976).

In summary, this case, as in Seven Elves, supra, meets the requirements for Rule 60(b) relief: (1) Rule 60(b) relief has not been sought here as a substitute for appeal; it has been sought because of the equitable and "unique circumstances" hereinabove described and because Rule 60(b) is designed to permit the district court to rectify its clear mistakes and obviate the expense and time for needless appeals; (2) Rule 60(b) should be liberally construed to achieve

16/ (continued)
order entered by the Court below, in the absence of a notice to the Appellant of the time fixed for the hearing, was within its jurisdiction under the quoted portion of Rule 56 . . ." (301 F.2d 126).

substantial justice; (3) the motions were filed within a reasonable time, one within 30 days and the other within 60 days; (4) Petitioners have been deprived of their day in court and trial on the merits, which outweighs the interest of finality of judgments; (5) there are no intervening inequities or prejudice to the Respondents; and (6) the other equitable considerations discussed above cry out for Rule 60(b) relief.

CONCLUSION AND PRAYER

The questions in this case have a significance that reaches across the breadth and depth of potentially all cases instituted in our federal courts. They all vitally affect two of the indispensable legs upon which the platform of due process rests – the right to be heard in the lower court and the right to be heard on the merits of an appeal from an adverse decision in the lower court. When rights so fundamental as these are involved

no one can say that the questions presented do not carry sufficient national importance, and constitute "special and important reasons", so as to justify the granting of writ of certiorari.

Rule 17 of the Supreme Court Rules states that this Court should grant writ of certiorari when the court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of (the Supreme) Court's power of supervision". If there was ever a case that qualified in the foregoing respects, it is this one. If there was ever a case where the district court precipitately granted the drastic remedy of summary judgment, it is this one. If there was ever a case where the salutory Harris/Thompson doctrine should have been applied, it is this one. If there was ever a case where Rule 60(b) relief was mandated, it is this one.

Mrs. Alvestad, whose husband worked side by side with Americans on the BORGNY DOLPHIN, exposed to the same hazards, asks only for fair treatment accorded to all who pursue their rights in our great judicial system – a right to be heard, a right to know when the court is going to rule so that her evidence and responses can be developed and presented by then, a right to have her motions to compel answers to interrogatories and motions to defer adjudication for the purpose of taking depositions ruled upon, and a right to have the district court, which admitted it was aware of the procedural post-judgment dilemma the Plaintiffs were in, to rule and act in good conscience so that the appealing party will at least have the opportunity to have its appeal heard on the merits.

In a nutshell, the one thing the district court knows, the court of appeals knows, and everyone can see from the record by

using hindsight: the district court could have just as easily entered its one sentence order denying the Petitioners' post-judgment relief on September 18 or 19 as on September 22, and had it done so, notice of appeal would have been timely filed. Instead, it chose to orally recognize certain errors in the pre-judgment proceedings (such as being unaware of motions to defer and notices of depositions), intimating that it would act to correct them; indicated it was aware that it should rule, if it was going to rule against Petitioners, by the next day (the 30th day post-judgment); and then inexplicably, and we are sure unintentionally, finessed the Petitioners by waiting three days beyond the 30-day period to rule and then surprisingly ruling against them. Surely, this is the kind of equitable situation Harris/Thompson was designed to correct.

Mrs. Alvestad and her daughter simply ask for a chance to be heard on the merits

of her case at some point in these proceedings and she has been denied this right in both the lower and appellate courts.

Respectfully submitted,

Benton Musslewhite
Law Offices of
Benton Musslewhite, Inc.
609 Fannin, Suite 517
Houston TX 77002
(713)222-2288

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of September, 1982, three true and correct copies of the above and foregoing Petition for Certiorari were sent to Steven DeWolf, of Vinson & Elkins, First City Tower, Houston, Texas, and to Randy McClanahan, of Baker & Botts, One Shell Plaza, Houston, Texas 77002, counsel for Respondents, by United States mail, postage prepaid.

_____

Benton Musslewhite

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MRS. AAGE LASSE ALVESTAD, ET AL	:	
Plaintiffs	:	
VS.	:	CIVIL ACTION NO. H-79-1883
MONSANTO COMPANY, ET AL,	:	
Defendants	:	

MEMORANDUM AND ORDER:

This action was filed by Plaintiff, a Norwegian national and personal representative of the deceased, for monetary damages due to the death of Aage Lasse Alvestad. It is alleged that decedent was working off the Borgny Dolphin, a semi-submersible drilling rig, in the English sector of the North Sea and that his death was due to the negligence of Defendants and unseaworthiness of the rig. Recovery is sought pursuant to the Jones Act, 46 U.S.C.A. 688, Death on the High Seas Act, 46 U.S.C.A. 761 et seq., and general maritime law. Currently pending

before the Court is Defendants' motion to dismiss based on limitations, and the unavailability of American law and the applicability of Norwegian and English law.

Although the death occurred on the high seas, the Death on the High Seas Act ("DOHSA") is inapplicable since the suit was instituted after the statute's two-year limitation period expired.[1] 46 U.S.C. 763; Hassan v. A. M. Landry & Son, Inc., 321 F.2d 570, 571 (5th Cir. 1963). Furthermore, since DOHSA provides the "exclusive" remedy for death on the high seas, Hlodan v. Ohio Barge Line, Inc., 611 F.2d 71, 75 (5th Cir. 1980), Plaintiff's remedy under general maritime law is also foreclosed. Id; Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978); Ivy v. Security Barge Lines, Inc., 585 F.2d 732 (5th Cir. 1978), reh. en banc, 606 F.2d 524 (5th Cir. 1979).

1/ The suit was originally instituted on January 31, 1978, more than two years after the alleged wrongful death on March 22, 1975.

With respect to the Jones Act claim (applicable to the death of a seaman on the high seas. Ivy, supra at 528), as well as the general maritime and death on the high seas claims, assuming for the sake of argument that the DOHSA claim was timely filed, chcice of law considerations[2/] point to the application of foreign law, not American law, in view of the substantial contacts with Norway and England. "The broad principles of choice of law established for Jones Act cases in Lauritzen v. Larsen, 345 U.S. 571 (1953), were declared equally applicable to cases arising under the general maritime law in Romero v. International Operating Co., 358 U.S. 354, 381-4 (1959), and have been applied to suits brought under the Death on the High Seas Act. Symonette

2/ The seven well-known factors of Lauritzen are: (1) Place of the wrongful act, (2) Law of the Flag, (3) Allegiance or Domicile of the Injured, (4) Allegiance of the Defendant Shipowner, (5) Place of Contract, (6) Inaccessibility of Foreign Forum, and (7) The Law of the Forum. An eighth factor added to the list in Hellenic Lines v. Rhoditis, 398 U.S. 306 (1970), is the base of operations.

Shipyards Ltd. v. Clark, 365 F.2d 464 (5th Cir. 1966)." Fitzgerald v. Texaco, 521 F.2d 448, 454 (2nd Cir. 1975), cert. denied, 423 U.S. 1052 (1976). Also see Ying Shive Jyu Fen v. Sanko Kisen (USA) Corp., 441 F.Supp. 45 (S.D. N.Y. 1977). Additionally, in view of the fact that dismissal of the foregoing has been explained not only in terms of lack of subject matter jurisdiction (particularly with respect to a Jones Act count) but in terms of forum non convenience (particularly with respect to general maritime and Death on the High Seas counts), or both, see Gilmore & Black, The Law of Admiralty, 481-482, 294 (2nd ed. 1975); Ying Shive Jyu Fen v. Sanka Kisen (USA) Corp., supra, an application of the factors in the landmark forum non convenience case of Gulf Oil Corp. v. Gilbert[3/], 330 U.S. 501 (1947), is necessary

3/ "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises,

and compels this court to alternatively decline jurisdiction. See Frangiskatos v. Kon Kar Maritime Enterprises, 471 F.2d 714 (2nd Cir. 1972).

For the foregoing reasons this action is DISMISSED.

Done at Houston, Texas, this 20th day of August, 1980.

SIGNED:/NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE

3/ (continued)
if view would be appropriate to the action; and all other practical problems that made trial of a case easy, expeditious, and inexpensive." 330 U.S. at 508.

APPENDIX 1A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MRS. AAGE LASSE ALVESTAD, ET AL	:	
Plaintiffs,	:	
VS.	:	CIVIL ACTION NO. H-79-1883
MONSANTO COMPANY, ET AL,	:	
Defendants	:	

FINAL JUDGMENT

From a consideration of the pleadings and materials submitted in this cause, it is the opinion of this Court that this action should be and is hereby dismissed.

This is a FINAL JUDGMENT.

Costs will be awarded to the prevailing party.

Done at Houston, Texas, this 20th day of August, 1980.

SIGNED:

NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE

APPENDIX 2

- - - - - -

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MRS. AAGE LASSE ALVESTAD, ET AL,	:	
Plaintiffs,	:	
VS.	:	CIVIL ACTION NO. H-79-1883
MONSANTO COMPANY, ET AL,	:	
Defendants	:	

O R D E R

Appearances: None

Counsel	Representing

Motion(s):

Plaintiff's Motion to Reconsider	Conference Hearing Neither	 — X

Plaintiff filed this action originally on January 31, 1978. On August 20, 1980, the Court dismissed the complaint based upon limitations, lack of subject matter jurisdiction, and forum non convenience. At a conference on September 18, 1980, although Plaintiff argued that he needed

more time for discovery, his main argument was with Fifth Circuit precedent.

Additional discovery would not aid Plaintiff in this matter. Plaintiff's argument is legal, not factual, and this Court is not in a position to change Fifth Circuit law.

Accordingly, Plaintiff's Motion to Reconsider is DENIED.

SIGNED/
NORMAN W. BLACK
UNITED STATES DISTRICT
JUDGE

Date Order Entered:
9/22/80

APPENDIX 3

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MRS. AAGE LASSE ALVESTAD, ET AL	:	
VS.	:	CIVIL ACTION NO. H-79-1883
MONSANTO COMPANY, ET AL	:	

ORDER

Appearances: None

Counsel	Representing

Motion(s): Plaintiff's second motion for relief from judgment	Conference	___
	Hearing	___
	Neither	X

Since Plaintiff has filed a proper notice of appeal from the Court's Order of Dismissal, this Court is without jurisdiction to consider Plaintiff's repetitious motion. Kirtland v. J. Ray McDermott & Co., 568 F.2d 1166, 1170 (5th Cir. 1978); United States v. Dunbar, 611 F.2d 985, 987 (5th Cir. 1980); 9 Moore' Federal Practice, Paragraph 203.11 at 3-48.

Date Order Entered: December 16, 1980

SIGNED/NORMAN W. BLACK
UNITED STATES
DISTRICT JUDGE

APPENDIX 4

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(From 671 Federal Reporter, 2d Series):

Mrs. Aage Lasse ALVESTAD, Individually and as Representative of the Estate of Aage Lasse Alvestad and Their Minor Daughter, Plaintiff-Appellant,

v.

MONSANTO COMPANY, et al, Defendants-Appellees

Nos. 80-2157, 81-2015

United States Court of Appeals, Fifth Circuit

April 1, 1982

Appeal was taken from judgment of the United States District Court for the Southern District of Texas, at Houston, Norman W. Black, Jr., dismissing action arising from death of diver working off a semi-submersible oil rig in the North Sea and from order of the district court denying motion for reconsideration. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) no unique circumstances were shown justifying relief from timeliness of requirement of rule requiring that notice of

appeal be filed within 30 days after entry of judgment or order appealed from, in case in which motion for new trial was not timely filed, where trial court had not assured appellant that her motion for new trial was timely or that court was extending time for filing notice of appeal, but at most acknowledged approaching deadline and indicated that it would try to accommodate appellant with speedy disposition of her motion, and (2) district court did not abuse its discretion in denying motion to reconsider, under rule governing relief from judgment, alleging only that the court had mistakenly interpreted the law.

Affirmed.

**Due to his death on December 22, 1981, Judge Ainsworth did not participate in this decision. The petition for rehearing is being decided by a quorum. 28 U.S.C. Section 46(d).

1. Federal Courts . . . 668

District court's mere willingness to entertain tardy motion for new trial does not relieve prospective appellant from responsibility for filing timely notice of appeal. Fed.Rules. Civ.Proc. Rule 4, 28 U.S.C.A.

2. Federal Courts . . . 670

No unique circumstances were shown justifying relief from timeliness of requirement of rule requiring that notice of appeal be filed within 30 days after entry of judgment or order appealed from, in case in which motion for new trial was not timely filed, where trial court had not assured appellant that her motion for new trial was timely or that court was extending time for filing notice of appeal, but at most acknowledged approaching deadline and indicated thatit would try to accommodate appellant with speedy disposition of her motion. F.R. A.P. Rule 4(a)(1, 4, 5) 28 U.S.C.A.; Fed. Rules Civ. Proc. Rules 59, 59(b), 60(b), 28 U.S.C.A.

3. Federal Courts . . . 825

Review of district court's action denying motion to reconsider under rule relating to relief from judgment was confined to whether denial of motion constituted an abuse of discretion. Fed.Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.

4. Federal Civil Procedure . . . 2656

Rule governing relief from judgment is not an appropriate avenue for relief from the trial court's mistakes of law. Fed. Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.

5. Federal Civil Procedure . . . 2656

District court did not abuse its discretion in denying motion to reconsider, under rule governing relief from judgment alleging only that the court had mistakenly interpreted the law. Fed.Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.

Law Offices of Benton Musslewhite, Inc., Benton Musslewhite, Houston, Texas, Louis R. Koerner, Jr., New Orleans, La., for plaintiff-appellant.

Vinson & Elkins, Steven K. DeWolf, Houston, Texas, for Monsanto Co.

Baker & Botts, Randy McClanahan, Houston Tex., for Monsanto Oil, Dolphin Inter., Inc., S.A.

Appeals from the United States District Court for the Southern District of Texas.

Before THORNBERRY, TATE and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Aage Lasse Alvestad, a citizen of Norway, was killed on March 22, 1975, while working as a diver off the semisubmersible oil rig Borgney Dolphin in the North Sea. The Borgney Dolphin was a Norwegian vessel operating under a contract with Monsanto Oil Company of the United Kingdom, Inc. (Monsanto UK), a wholly-owned subsidiary of the United States-based Monsanto Company. The 3X Diving Company, Alvestad's immediate employer, had contracted with Monsanto UK to provide diving services for the drilling operation.

Alvestad's widow filed suit against Monsanto and Monsanto UK in 1978, stating causes of action under the Jones Act, 46 U.S.C. 688, the Death on the High Seas Act (DOHSA), 46 U.S.C. 761-767, general maritime law, and the Texas Wongful Death and Survival statutes, Tex.Rev.Civ.Stat.Ann. arts. 4671-4678, 5525 (Vernon 1940 & Supp. 1980-1981). On August 20, 1980, the district court granted Monsanto's motion to dismiss

the action and entered a final judgment to that effect. In a Memorandum and Order filed with the judgment, the court explained that DOHSA's two-year statute of limitations had expired prior to institution of the suit, thereby barring any recovery under that statute. It further found any action pursuant to general maritime law foreclosed because DOHSA is the exclusive remedy for death on the high seas (citing Hlodan v. Ohio Barge Line, Inc., 611 F.2d 71, 75 (5th Cir. 1980). The court also found it necessary to decline jurisdiction regardless of the limitations problem because the lack of sufficient contacts between the action and this country indicated that foreign rather than American law should apply and that a federal district court would be a forum non conveniens.

It is only with the entry of final judgment against Mrs. Alvestad on August 20, however, that the critical period of this

procedural history begins. On September 10, 1980, Mrs. Alvestad filed a "Motion to Reconsider Order Dismissing Cause of Action and Motion to Reinstate and Motion to Grant a New Trial Pursuant to Rules 59 and 60 of (Federal Rules of Civil Procedure)." The court held a hearing on this motion on September 18, at which plaintiff argued that dismissal of the action was premature because she had not yet completed her discovery. Apparently hoping for a quick and favorable response to her motion, plaintiff filed no notice of appeal from the final judgment prior to September 19, when the thirty-day deadline prescribed by Fed.R. App.P. 4(a)(1) elapsed. On September 22, the district court denied the Motion to Reconsider, pointing out that the reason for its original dismissal of plaintiff's claims was legal, not factual, and that further discovery could avail plaintiff nothing. Not until October 20 did plaintiff file a notice of appeal.

Mrs. Alvestad now appeals both from the final judgment dismissing her claims and from the subsequent denial of her motion to reconsider. As explained below, we conclude that we may not consider her appeal from the judgment because her notice of appeal was not timely filed. We further find that the district court did not abuse its discretion in denying the posttrial motion to reconsider. Accordingly, we affirm the judgment entered below.

The Appeal From Final Judgment

Rule 4(a)(1) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed "within 30 days after the date of entry of the judgment or order appealed from." The district court entered its judgment dismissing Mrs. Alvestad's suit on August 20. She filed her notice of appeal on October 20, sixty-one days later and thirty-one days late. Consequently, her appeal must fail unless she falls within some exception to the rule.

Rule 4(a)(4) provides that the filing of a timely motion for a new trial under Fed.R.Civ.P. 59 will toll the running of the period for filing an appeal until the entry of an order denying the Rule 59 motion. Mrs. Alvestad filed her motions pursuant to Rules 59 and 60(b) on September 10. This was eleven days after the ten-day limit prescribed by Rule 60(b). Clearly the motion for a new trial was not timely.

While conceding the tardiness of her motion, Mrs. Alvestad presses upon us the applicability of a judicially created exception to the timeliness requirements of Rule 4. In Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962) and Thompson v. Immigration and Naturalization Service, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964), the Supreme Court excused a party's failure to file a timely notice of appeal because of the "unique circumstances" in which the party had relied

upon a district court's erroneous, but nonetheless explicit, grant of an extension of the time for filing an appeal. Instead of recounting in full the significant facts of those decisions, we may resort to a previous condensation of the "unique circumstances" that were present in both:

> In each case, counsel for the appellant was lulled into the false sense of security that he could delay filing the notice of appeal until after the time prescribed by the applicable rules because of the extension of time granted by the court. In each case, the appellant was misled by the words or conduct of the trial court into believing that the time for appeal was extended beyond that prescribed by the applicable rules.

Hernandez-Rivera v. Immigration & Naturalization Service, 630 F.2d 1352, 1355 (9th Cir. 1980) (emphasis supplied).

Mrs. Alvestad argues that the "unique circumstances" of her predicament warrant our extension of the Harris-Thompson

exception to salvage her appeal. The district court heard argument on her motion on September 18, one day before expiration of the regular thirty-day limit for filing an appeal. According to Mrs. Alvestad, the court indicated its awareness that the deadline for appeal was imminent. Moreover, she claims, the court "proceeded to make comments which were properly and reasonably construed by the Plaintiffs as indicating that the Court would either rule favorably or would rule by the next day so that Plaintiffs could file their notice of appeal." Allegedly fearful that the filing of a notice of appeal would force the court to relinquish jurisdiction before it could grant her motions, Mrs. Alvestad allowed the thirty-day deadline to elapse without acting on the mandatory notice.

Even accepting this version of the hearing (apparently no transcript exists), we are not persuaded that it presents "unique circumstances" sufficient to excuse the failure

to file a timely appeal. While we willingly have administered the Supreme Court's equitable exception to avoid dismissal of an otherwise tardy appeal, we have done so only when the words or actions of the district court clearly misled the aggrieved party into believing that the filing of an appeal within the thirty-day deadline was unnecessary. In Chipser v. Kohlmeyer & Co., 600 F.2d 1061, 1963 (5th Cir. 1979), for example, we excused a plaintiff's good faith reliance on a district court's statement "which implied that a new trial had been granted without qualification". As in Harris and Thompson, the trial judge's statements gave plaintiff every reason to believe that the court effectively had extended the deadline for appeal.

(1,2) In this case, however, the district court's comments – whatever they may have been – clearly stopped short of assuring Mrs. Alvestad that her motion for a new trial was timely or that the court was extending the time for filing of a notice of

appeal.[1] At most, the court acknowledged the approaching deadline (which, in itself, should have put appellant on notice that the deadline had not been extended) and indicated that it would try to accommodate the plaintiff with a speedy disposition of her motion. The court's action is, if anything, subject to construction as an invitation for Mrs. Alvestad to request an extension of the time for filing notice, as permitted by Fed.R.App.P. 4(a)(5).

If on September 18, one day before the running of her time for appeal, Mrs. Alvestad had truly believed the district court to be favorably inclined toward her motions and close to an immediate ruling, she could have asked the court for an extension pursuant to Rule 4(a)(5). Even when the ruling did not issue until September 22, three days after

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[1] Certainly the district court's mere willingness to entertain a tardy motion for a new trial does not relieve the prospective appellant from responsibility for filing a timely notice. See, e.g., Gribble v. Harris, 625 F.2d 1173, 1174-75 (5th Cir. 1980).

her deadline was passed, she still had twenty-seven days until Rule 4(a)(5) in which to ask for such an extension.[2] Instead, having allowed the deadline for appeal to pass without requesting any relief from it, she waited nearly another month before filing the notice of appeal on October 20. Given this neglect of opportunities to obtain the desired ruling on her motions without abandoning the appeal, we cannot conclude that Mrs. Alvestad has proven herself the victim of unique circumstances justifying relief from the timeliness requirement of Rule 4(a)(1). Consequently, we do not consider the appeal from the district court's judgment.

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[2] Alternatively, appellant could have filed the notice of appeal. Although the filing of a notice of appeal divests the trial court of jurisdiction, see United States v. Dunbar, 611 F.2d 985, 987 (5th Cir. 1980) cert. denied, 447 U.S. 926, 100 S.Ct. 3022, 65 L.Ed.2d 1120 (1980), Mrs. Alvestad would have been able to seek a remand to the district court when and if it agreed that a new trial or some alteration in its judgment was appropriate.

The Rule 60(b) Motion

(3) The district court denied Mrs. Alvestad's Rule 60(b) Motion to Reconsider on September 22, and the notice of appeal filed October 20 is timely with respect to this order.[3] Our review of the district court's action is confined to whether denial of the motion constituted an abuse of discretion. Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981).

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2 (continued)
See 7 J. Moore, Federal Practice, Para. 60.30(2) at 419-24 (1970). If this court had declined to take such a course, appellant still would have been in a position to secure any merited relief through our review of the district court's actions.

3 Appellant filed a second Rule 60(b) motion on October 16. The district court subsequently declined to consider this motion when the October 20 notice of appeal removed jurisdiction to this court. The district court already had denied the first Rule 60(b) motion (on September 22) when appellant filed her notice of appeal on October 20, however, so the timely notice is sufficient to support an appeal from that order.

Appellant relies upon three of the six reasons for which a district court may relieve a party from judgment under Rule 60(b): "(1) mistake, inadvertence, surprise or excusable neglect; . . . (4) the judgment is void; . . . or (6) any other reason justifying relief from the operation of the judgment." She then cited Compton v. Alton Steamship Company, 608 F.2d 96 (4th Cir. 1979), for the proposition that these three grounds for relief collectively encompass a trial court's mistakes of law. Mrs. Alvestad's complaint about the judgment, simply stated, is that the court below prematurely shut off her discovery and erroneously applied the Jones Act's definition of "employer", the law of conflicts, and the doctrine of forum non conveniens to the facts of this dispute.

(4) Without reaching the merits of these contentions, we do not regard Rule 60(b) as an appropriate avenue for relief from judicial mistakes of this kind. The Fourth Circuit

in Compton undeniably construed Rule 60(b) as providing for relief from legal errors committed by a trial court. However, it referred only to situations in which "the mistake was clear on the record, and involved a plain misconstruction of the statute on which the action was grounded...." 608 F.2d at 104. Our own decision in Meadows v. Cohen, 409 F.2d 750 (5th Cir. 1969), quoted extensively in Compton, held a district court to have abused its discretion in not granting a Rule 60(b) motion for relief from a judgment "which was clearly at variance with the plain wording" of a federal statute. Id at 753.

While we thus have admonished district courts that they should honor requests to reform a judgment in obvious conflict with a clear statutory mandate, we have been equally insistent that Rule 60(b) is not a substitute for the ordinary method of redressing judicial error - appeal. In its

origins, Rule 60(b) "represents an effort to codify the equitable practice with respect to the correction of judgments after the time for appeal has expired." Lafferty v. District of Columbia, 277 F.2d 348, 351 h.6 (D.C.Cir. 1960). It is not a means for postponing or escaping that expiration.

In Gary W. v. Louisiana, 622 F.2d 804 (5th Cir. 1980), cert. denied 450 U.S. 994, 101 S.Ct. 1695, 68 L.Ed.2d 193 (1981), appellant who had neglected to appeal an award of attorneys' fees against them sought relief from the judgment through a Rule 60(b) motion. On appeal from the district court's denial of their motion, appellants maintained that this denial was an abuse of discretion because the court had committed the "mistake" of applying the wrong legal standard. "(E)ven if the trial court had misapplied an incorrect legal standard when assessing legal fees," we observed in affirming the denial, "the proper way to challenge its ruling in the

court of appeals is by appeal of its ruling, not by appeal of a denial of a Rule 60(b) motion." 622 F.2d at 805 (footnote omitted).[4]

Similarly, in Fackelman v. Bell, 564 F.2d 734 (5th Cir. 1977), this court rebuffed an appellant's effort, to use Rule 60(b) to reopen an adverse judgment on the ground that the district court had erroneously interpreted the Freedom of Information Act:

> All of these mistakes, if mistakes they be, are mistakes of law and could have been raised on appeal. The law of this Circuit permits a trial judge, in his discretion, to reopen a judgment on the basis of an error of law . . . But such reopenings are certainly not mandatory. The orderly process of appeal usually is far more appropriate to deal with such errors.

564 F.2d at 736.

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[4] Moreover, this court long ago listed eight factors as stated by Prof. Moore in his treatise, that guide a district court's consideration of a Rule 60(b) motion. See United States v. Gould, 301 F.2d 353, 355-56 (5th Cir. 1962). One of the foremost is "that the Rule 60(b) motion is not to be used as a substitute for appeal." See also Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981). Even Professor Moore, to whom we may trace the controversial idea that "mistake" under Rule 60(b) includes "mistakes of law", see Silk v. Sandoval, 435 F.2d 1266, 1267 (1st Cir. 1971), cert. denied, 402 U.S. 1012, 91 S.Ct.

(5) As Fackelman went on to explain, we have attempted in our prior decisions on Rule 60(b), including Meadows, merely to avoid wasting appellate resources on the perfunctory correction of "obvious errors of law." Id. This case contains no such facially obvious error. Although appellant employs the customary rhetorical device of depicting each alleged error as clear and beyond question, the only thing made clear by the numerous brief submitted by all parties to this dispute is that the legal questions presented are at least arguable. Without intimating any view of the merits, we are certain that an inquiry into whether the court below properly applied the seven-part choice-of-law test announced in Lauritzen v. Larsen, 345 U.S. 571, 583-91, 73 S.Ct. 921, 928-32, 97 L.Ed. 1254 (1953) or the similarly multi-faceted

4 (continued)
2189, 29 L.Ed.2d 435 (1971) (citing with disapproval 7 J. Moore, Federal Practice Para. 60.22(3) (1970)), agrees that Rule 60(b) is no alternative to an appeal. See Moore, supra, Para. 60.27(2) at 353.

forum non conveniens analysis required by Gulf Oil v. Gilbert, 330 U.S. 501, 508-09, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947) is one which could have and more suitably which should have been undertaken on appeal rather than as a mere prelude to an attempt to show discretionary abuse under Rule 60(b).

In sum, therefore, we cannot say that the district court abused its discretion in denying a Rule 60(b) motion alleging only that the court had mistakenly interpreted the law. The judgment below is AFFIRMED.

APPENDIX 5

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOS. 80-2157
&
81-2015

MRS. AAGE LASSE ALVESTAD,
Individually and as Representative
of the estate of Aage Lasse Alvestad
and their minor daughter,

Plaintiff-Appellant

versus

MONSANTO COMPANY, ET AL,

Defendants-Appellees.

- - - - -

Appeals from the United States
District Court for the
Southern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 4/1/82, 5 Cir., 198_, _____ F.2d ___)

(May 17, 1982)

Before THORNBERRY, TATE and WILLIAMS, Circuit Judges

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court

having requested that the Court be polled on rehearing en banc, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED. . .

ENTERED FOR THE COURT:

SIGNED/J. WILLIAMS
United States Circuit Judge

APPENDIX 6A

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AMENDMENT XIV - UNITED STATES CONSTITUTION

AMENDMENT XIV . . .

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . .

APPENDIX 6B

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Rule 4 - Federal Rules of Appellate Procedure

(a) Appeals in Civil Cases . . .

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later. . .

APPENDIX 6C

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Rule 26 - Federal Rules of Appellate Procedure.

(a) Computation of Time. In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.

APPENDIX 6D

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Rule 12 - Federal Rules of Civil Procedure

Defenses and Objections - When and How Presented - By Pleading or Motion - Motion for Judgment on Pleadings

. . .

(b) How Presented. Every defense, in law of fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading

or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. . .

APPENDIX 6E

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Rule 56. Federal Rules of Civil Procedure. Summary Judgment . . .

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be

rendered on the issue of liability alone although there is no genuine issue as to the amount of damages. . .

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuire issue for

trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. . .

APPENDIX 6F

Rule 59. Federal Rules of Civil Procedure. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment. . .

APPENDIX 6G

Rule 60 - Federal Rules of Civil Procedure

Relief from Judgment or Order

. . . (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should

have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or pcoeeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., Section 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.

EXCERPTS
APPENDIX 7

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MRS. AAGE LASSE ALVESTAD, Individually and as Representative of the Estate of AAGE LASSE ALVESTAD, and their minor daughter	:	C.A. NO. H-79-1883
	:	(Filed Sept. 10, 1980)
VS.	:	
MONSANTO COMPANY, ET AL	:	

MOTION TO RECONSIDER ORDER OF THE COURT DISMISSING CAUSE OF ACTION AND TO REINSTATE CAUSE OF ACTION AND MOTION TO GRANT A NEW TRIAL PURSUANT TO RULES 59 AND 60 OF F.R.C.P.

TO THE HONORABLE JUDGE OF SAID COURT:

. . .

I.

While the Defendant's Motions to Dismiss under Rule 12(b) and for forum non conveniens have been pending for quite some time, the undersigned counsel took over as attorney in charge on August 5, 1980, in lieu of Louis Koerner, who became unavailable due

to ungoing litigation in the State of Pennsylvania, and mailed on August 6, 1980 a Motion to Defer Determination of Defendant's Motion to Dismiss Under Rule 12(b) F.R.C.P., on Grounds of Forum Non Conveniens and on Grounds of Limitations, which Motion to defer and the transmittal letter are attached hereto as Exhibit A and incorporated herein by reference. On August 11, 1980, Plaintiff received a notice from the Court which is attached hereto as Exhibit B and incorporated herein by reference that the Court was placing the Plaintiff's Motion to Defer upon the "Court's written motion docket for September 1, 1980". Nine days later Plaintiff received the Memorandum and Order of this Court dismissing this cause on grounds of forum non conveniens, same being attached hereto as Exhibit C and incorporated herein by reference.

II.

Plaintiff is hopeful that the Court was unaware of the Plaintiff's Motion to Defer

because the Court did not give the Plaintiff an opportunity to have said Motion presented and heard as per its notice of August 11, 1980 (Exhibit B). In that connection Plaintiff would call to the attention of the Court that a notice of deposition is attached to said Motion to Defer which calls for the deposition of the corporate officers of the various companies involved including Monsanto Oil Company, U.K., Inc., Dolphin International, Inc., Monsanto Company, and the various individuals who would have the information, charters, agreements, records, Board of Directors lists and other information which would be necessary for the Plaintiffs to properly prepare their case. Depositions were set for August 26 and August 27, 1980 at 9:00 a.m. but Defendants declined to present their witnesses due to this Court's Order of August 20, 1980.

III.

Your Plaintiff would respectfully show to the Court that it would be premature and a gross miscarriage of justice to pre-

clude the Plaintiffs from taking the depositions, sought by the above referred to notice and to permit the Plaintiffs to have further discovery in this matter. Attempting to get the Defendants to cooperate with respect to discovery has been difficult if not impossible in this case. The Plaintiffs have filed interrogatories addressed to the Defendants as indicated by the Court file in this cause. Reference is now made to said interrogatories. The Court file also reflects that the Defendants have either objected to or not filed answers to those interrogatories. In the meantime the Defendants, in their pleadings and motions, have represented that the vessel in question, the Borgny Dolphin, had nothing to do with the United States and there was no connection between the vessel and the United States. Late last year the Plaintiff understood from different sources that this was not true and that the vessel was directly

and/or indirectly controlled by the United States through various corporations and the Plaintiff then began to secure documents from a non-defendant, Occidental Petroleum Company. Those efforts were difficult and it was not until May of this year that Plaintiff was able to secure those documents. It took several months for Plaintiff to arrange to secure said documents from Occidental (the Defendants having refused to produce them through interrogatories) and they were finally subpoenaed from Occidental; as an indication of the difficulty involved, letters and the deposition of Mr. Christovich, attorney for Occidental, are attached hereto and incorporated herein by reference and marked Exhibit D.

IV.

In order to secure said documents it became necessary for Plaintiff's counsel to make a trip to England which, as stated above, was done in May. The documents finally produced by Occidental show that the vessel in

question was probably controlled by corporations which are American corporations and which have their base of operations in the United States. A sample of those documents are attached hereto in a group marked Exhibit E. Plaintiff respectfully urges the Court to read these documents to see how incorrect, misleading and hallow the representations of Defendants have been in their pleadings that this vessel had no connection with the United States of America.

V.

At the time those documents were finally procured Plaintiffs' attorney in charge at that time, Louis Koerner, was called to trial in a very complicated anti-trust case in Pennsylvania and though he expected to have the case completed before now he is still in trial in that case to this very date. In July of this year when he saw that the trial was going to continue on, Mr. Koerner requested that the undersigned attorney take charge of the case and it was then, in early August of 1980 that

Plaintiff's counsel was able to procure enough of the files to begin to take charge of the case and manage the case on the docket. As noted above, Plaintiff then on August 11, 1980 filed a motion with the Court to defer determination pending further discovery and noticed the Defendant's witnesses for depositions. Plaintiffs would show that it would not have been sufficient, proper or good practice to have taken the deposition of these witnesses before procuring documents from Occidental which, through no fault of the Plaintiffs, were not procured until May, 1980, Thus, under these circumstances it would be a gross miscarriage of justice to preclude these Plaintiffs from having the opportunity to corroborate the documents procured from Occidental and to show clearly that the Borgny Dolphin was in truth and in fact, as found by the Court in cases hereinafter cited, subject to the control and direction of persons or officers living and working

in the United States of America. Incidentally, the records which are attached hereto were produced by Occidental pursuant to a subpoena and therefore are official records of this Court and are verified as per verification of this motion and pleading.

VII.

Plaintiff respectfully requests the Court to call an oral hearing upon this Motion since all defense counsel will oppose same and at such time and place Plaintiff would respectfully request permission to show the Court the entire files on the Alvestad case which would demonstrate to the Court that diligent efforts have been made by the Plaintiff to obtain discovery through the most cooperative manner and with the least trouble to the Defendants. Finding that such considerate tack has not produced the desired information, Plaintiff has noticed the deposition and intends to follow through such depositions until the information which will decide these issues one

way or the other, on a fully informed basis, has been obtained. Plaintiff would show that no harm will befall either party should this Court decide to give the Plaintiff opportunity to secure the information needed. . . . . .

X.

Plaintiff would further show that this Court would commit grave error if it did not permit an oral hearing on Defendant's Motions to Dismiss and Plaintiffs' Motion for Rehearing. Those motions are summary motions which terminate the litigation and are of the most serious nature. There is a multitude of authorites that it is absolute error for a Court to refuse to grant a hearing on such motions, and in this connection Plaintiff would show that no such hearing has been held in this case. If this motion is not clear we now specifically and expressly request this Court to grant us a hearing on the Defendants' Motions to Dismiss, upon our motions to reinstate,

upon our motions for new trial, and upon our motions for additional time in which to conduct discovery and for such other and further motions as may be necessary and proper to see that justice is done in this case. In connection with the failure of the Court to grant such hearing see Brown v. Quinlan, 138 F.2d 228, 229 (7th Cir., 1943); Dredge Corporation v. Penner, 338 F.2d 456, 461-462 (9th Cir. 1964); Season-All Industries, Incorporated v. Turkiye-Sise Ve Cam Fabrikalary A.F., 425 F.2d 34 (3rd Cir., 1970).

XI.

Moreover, it is error for the Court to grant summary relief such as this when the Defendants have not answered the interrogatories. Dollar v. Long Mfg., Inc., 561 F.2d 613 (5th Cir. 1977); Coleman v. Checker Taxi Co., 325 F.2d 853 (7th Cir., 1963) and see particularly Parrish v. Board of Commissioners of Alabama State Bar, 533 F.2d 942 (5th Cir., 1976), where the Fifth Circuit Court stated:

"Of course, the whole purpose of discovery in a case in which a motion for

summary judgment is filed is to give the opposing party an opportunity to discover as many facts as are available and he considers essential to determine whether he can honestly file opposing affidavits. We conclude that the granting of the motion for summary judgment by the trial court without requiring the production of these documents requested deprive the Appellants of an opportunity to develop the facts on which they sought to create a fact issue before the trial court." (emphasis ours).

Also see particularly Bane v. Spencer, 393 F.2d 108 (___ Cir. 1968) where the _____ Circuit Court stated.

"Furthermore, it should be fundamental that a defendant who has failed to answer relevant and timely interrogatories is, at least normally, in no position to obtain summary judgment."

In this connection it is not necessary that Plaintiffs file motions to compel; the rule is simply based on the fact that a person coming in the Court asking to terminate the other side's litigation has to show that it has done all that it can to produce information required or asked for in connection with the grounds for terminating their litigation. These Defendants have produced

nothing, have been obstreperous about cooperating on anything, and now they want to benefit and profit from their failure to produce information in answer to interrogatories and the Courts hold that it is unjust and unproper (to grant) summary relief (where Defendants have) not done (their) part in cooperating with respect to discovery.

XII.

Therefore, your Plaintiff urgently requests this Court not to deprive this widow of her day in Court. Numerous cases indicate that the trend in American law is that the Courts are disregarding the device of Defendant's setting up subsidiary and foreign corporations in order to avoid American law, when a realistic view of the situation is that the ultimate control of a rig really is based in the U.S. (see authorities cited above and opinions attached hereto). Most importantly, the Plaintiff simply has not had its day in Court with respect to the Defendants' motions.

As many Courts have indicated, time is not the sole measure of appropriate discovery; when the record clearly reflects, as it does here, that the Plaintiffs have been diligent in seeking the documents which it finally got, not from the Defendants, but from a non-party, and that when those documents were obtained, it revealed the distinct possibility, even probability, that the rig in question was ultimately controlled out of the U.S., it is Plaintiffs' position that it would be a clear abuse of error to refuse further discovery on the Defendants' motions. The Fifth Circuit has recently granted one or more writs of mandamus in cases where the Trial Court has failed to have an oral hearing on Motions to Dismiss. See In Re Cooper Fire & Rubber Co., Petitioner, Cause No. 78-2105 (5th Cir., dated 8-31--8); see also In Re Textron, Inc., et al, Petitioners, Cause No. 79-2216 (5th Cir., dated 11-19-79).

. . .

Respectfully submitted,

LAW OFFICES OF
BENTON MUSSLEWHITE,
INC.

SIGNED/BENTON MUSSLEWHITE
3506 Travis St.
Houston, Texas 77002
(713)520-0621

EXCERPTS
APPENDIX 8
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MRS. AAGE LASSE ALVESTAD, ET AL	:	
	:	(Filed Oct. 16, 1980)
V.	:	
MONSANTO COMPANY, ET AL	:	NO. H-79-1883

MOTION OF THE PLAINTIFFS FOR RELIEF
FROM THE FINAL JUDGMENT OF THIS COURT
DATED AUGUST 20, 1980,
PURSUANT TO RULE 60(b)
OF THE FEDERAL RULES OF CIVIL PROCEDURE
AND FOR RELIEF UNDER THE GENERAL
POWER OF THIS COURT TO RESCIND
ITS ORDERS AND JUDGMENTS AND REINSTATE
A CAUSE OF ACTION AND GRANT FURTHER RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiffs and moves the Court for relief from the Judgment of August 20, 1980, requesting the Court to rescind said Order and Judgment to reinstate this cause of action, to grant reasonable time for discovery with respect to the Defendants' Motion to Dismiss, and, upon completion of discovery, to deny Defendants' Motion to Dismiss, grant this Plaintiff its day in Court and in such respects would respectfully show as follows, to-wit:

I.

An Itemization of Procedural Events Before This Court and the Posture of this Case Procedurally

1. Plaintiff filed suit on January 27, 1978 in the United States District Court for the Eastern District of Texas, Sherman Division, against the Defendants, Monsanto Company (hereafter referred to as "Monsanto") and Monsanto Oil U.K. (hereafter referred to as "Monsanto U.K."). Plaintiff alleged a cause of action under the Jones Act, 46 U.S.C. Section 688, General Maritime Law; and The Death on the High Seas Act, as well as the Wrongful Death and Survival Statutes of the State of Texas. The Plaintiff alleged that the decedent, Aage Lasse Alvestad, was a crew member of the vessel, "Borgny Dolphin", on about the 22nd day of March, 1975, when he met his death due to the unseaworthiness of the Borgny Dolphin and "the negligence of the agents, servants and employees of the Defendants". The Estate of Mr. Alvestad sought damages on behalf of his surviving widow and child.

2. On March 14, 1978, one of the Defendants, Monsanto Company, filed a Motion to Dismiss and/or for Summary Judgment, without first having answered and the Court advised such Defendant that it was improper to bring such Motion before filing an answer. Thereafter, said Motion was considered moot, never responded to and never brought forward by the Defendant. The Court's Order ordering the Defendant to Answer before filing any Motion for Summary Judgment was dated April 3, 1978 and is now referred to for all purposes.

3. Soon after the filing by the Defendant Monsanto, of its Motion for Summary Judgment and Motion to Dismiss, Plaintiff submitted Interrogatories to the Defendant Monsanto and the Defendant Monsanto U.K. and on April 5, 1978 the Defendant Monsanto filed its Objections to the Interrogatories and a Motion for Protective Order, urging the Court that it should not have to answer any of said interrogatories. Said interrogatories were aimed at Defendant's Motion to Dismiss.

4. Thereafter, the Plaintiff filed a Motion to Compel Answers to Interrogatories by the Defendant Monsanto and, following the filing of such Motion, the Defendant Monsanto, on May 26, 1978, filed partial Answers to Interrogatories. The Defendant refused and failed to answer (which was also made a part of their Objections to Interrogatories and Motion for Protective Order) Interrogatories Nos. 9, 10, 11, 15, 21, 27, 29, 23, 25, 34, 35 and 36. . .

5. Defendant Monsanto admitted in its Memorandum Brief and Response to Plaintiffs' Motion to Compel Answers to Interrogatories, filed in the Sherman Court, all of which pleadings were transferred to this Court, that "Interrogatories Nos. 9, 10, 11, 15, 21, 27 and 29 are obviously intended to develop information on facts the Second Circuit at least has held to be significant under Rhoditis....as noted, Monsanto has not jurisdiction in issue..." (page 3 of Monsanto

Company's Memorandum Brief). Therefore, Monsanto even agrees that the information requested in the interrogatories was relevant to a Motion to Dismiss (which it stated at that point had not been placed in issue) but when a subsequently filed motion to Dismiss on the same grounds as previously filed by the Monsanto Defendants was placed in issue this Court never compelled the Defendant to answer those questions which the Defendant admitted themselves were material to the dismissal motions in issue. Without any quetsion, this Court erred in failing to do so, as noted by decisions hereinafter discussed.

6. In that connection, we call the Court's attention to the fact that it notified all parties on April 12, 1978, that the Plaintiff had filed a Motion to Compel Answers to Interrogatories, that the Motion had been served on all adverse parties, and that "the local rule is to consider motions on the

pleadings, without oral hearing, unless, on showing of good cause, an oral hearing is granted...request for oral hearing, if any, should be made when the motion or the reply is filed." The Court made it clear that if neither party requested an oral hearing upon such motion to Compel same would be ruled upon by the Court upon the pleadings and the motions without such hearing. This rule conforms to the rule of the Houston Division for the Southern District of Texas. No oral hearing on the motion to compel was ever requested by any of the parties; yet despite the Court's notification, neither the Sherman Division nor the Houston Division ever ruled upon Plaintiffs' Motion to Compel. There is nothing in the rules we know of that places a burden upon the Plaintiff, or any party, to request the Court a second time to rule upon motions to compel. Once the Court indicates it will rule upon such motion, all parties certainly should be entitled to assume that it will do so prior to taking

such drastic action as granting a motion to dismiss on matters to which the motion to compel related. Since the court never ruled on the Motion to Compel, the Defendants never answered the mentioned Interrogatories or provided the information requested therein.

. . .

14. On July 28, 1978, the Plaintiffs submitted Additional Interrogatories and Requests for Production of Records to Defendants Monsanto and Monsanto U.K. Thereafter, both Defendants filed objections to said interrogatories and never answered said Interrogatories. Said interrogatories included crucial questions such as: (No. 1)....identify all officers, agents or employees of 'Defendant' who exercised control over and gave direction to the decedant, to his immediate employers, to Dolphin International, S.A. or to Dolphin International, Inc., or who were in charge of or engaged in supervision of contractors, subcontractors or crew members in the ....

operation....of the 'Borgny Dolphin';....
(No.2) identify all documents, communications and contacts concerning the Borgny Dolphin, its chartering, control or its operation and all other contractual or legal relationships involving the operation of said vessel or contacts or contracts with Dolphin International, S.A., Dolphin International, Inc.; all reports, invoices or other materials concerning the maintenance or oepration of the 'Borgny Dolphin'; and all reports concerning the casualty and investigation of the death of the decedant; all contractual and other agreements between one or more of the Defendants and Dolphin International, S.A. or Dolphin International, Inc.; and all payroll records, time sheets or documents pertaining to the work activity of the decedant;....(No. 3) identify all Defendants' employees of either the Monsanto companies or the Dolphin companies who were employed or consulted or had employment duties

regarding the operation or maintenance of the Borgny Dolphin;....(No. 5) state places of incorporation and principal places of business of the Monsanto and Dolphin companies, and the 3 X Diving Company;.... (No. 6) identify all the documents between the two Dolphin companies, the Monsanto companies, and the 3 X Diving Company;.... (No. 9) identify all owners of the Borgny Dolphin and the percentage or fractional ownership of each;....(No. 10) identify the persons of entities and their relationship to any of the various Defendants and/ or the Borgny Dolphin, including Dolphin International, Inc., Dolphin International, S.A., Demenex, 3X Diving Company, Ltd., Bob Colomy, Martin David, Gary Miller, David Compton, Fred Olsen and Company, Kurt Knut Solvang, Newton Schoals, Ron Edwards, Chemical Bank of New York, Export Import Bank of Washington, D.C., Occidental Oil Company, Occidental Britain, Inc.;....(No. 11) identify all diving contracts in effect concerning the

Borgny Dolphin pursuant to which the decedant was employed, and particularly the parties to the contract and those persons or entities who received copies of said contract;....(No. 12) identify all drilling contracts in effect concerning the Borgny Dolphin pursuant to which the decedant was employed or was working, including the parties to the contract and the persons who received copies of same;....(No. 13) identify the person responsible for the financing the operation of the Borgny Dolphin;....(No. 14) whether the decedant was employed as a seaman or what task he was performing on the date of his casualty, including a description of his duties and identify the person or persons responsible for his being hired and controlling his work on board the vessel;....(No. 15) identify all persons, firms and corporations to whom funds were remitted as derived from the activities of the Borgny Dolphin;....(No. 16) identify all documents, including contracts

submitted to the Chemical Bank of New York and the Import-Export Bank in Washington, D.C., with regard to the financing and operation of the Borgny Dolphin;....(No. 17) identify all entities, other than Monsanto U.K., who the Defendants contend caused or contributed to the death of the decedant and/or was a Jones Act employer of the decedant, other than Monsanto U.K.; ....(No. 19) identify all employees of the Defendants, Dolphin International, S.A. and Dolphin International, Inc., who were employed in a supervisory capacity on the vessel in question;....(No. 20) identify the Borgny Dolphin, including the type of vessel it was;....(No. 21) identify the company ultimately responsible for the operation of the Borgny Dolphin;....(No. 22) identify the parties responsible for the promulgation of rules and regulations and the carrying out of such rules and regulations concerning the operation of the Borgny Dolphin;....and (No. 25) explain the nature

the relationship each of the Monsanto Defendants had to the Borgny Dolphin on March 22, 1975. The other Interrogatories contained therein related to liability, the question of unseaworthiness and/or negligence. In that same document, the Plaintiffs requested production of all the documents that were identified. It is inconceivable that this Court would rule without answers to those interrogatories having been made and without and production of the documents mentioned therein. As we point out under Argument and Authorities below, it is self-evident that all of said questions were absolutely and totally relevant and controlling of the decision to be made by this Court. . . .

17. On November 27, 1979, the Defendant Monsanto U.K. filed its Motion to Dismiss on the grounds of limitations, alleging that Plaintiffs' suit was time barred because the only remedy available to the Plaintiffs was the Death on the High Seas

Act which had a two-year statute of limitations. It asserted that as a matter of law the decedant was not the Jones Act employee of the Defendant Monsanto U.K. No affidavit was attached to said motion. On January 31, 1980, Dolphin and Dolphin S.A. filed a Motion to Dismiss on grounds of limitation. The Dolphin Defendants contended that the cause of action was time barred against them because, as a matter of law, the decedant was not the Jones Act employee of said Defendants, but was the Jones Act employee of 3X Diving Company, Ltd. of Stavenger, Norway, and that the Plaintiffs' only cause of action against the Dolphin Defendants was under the Death on the High Seas Act which provides for a two-year Statute of Limitation and therefore Plaintiffs cause of action was barred by limitations. No affidavit was attached to said Motion. On January 9, 1980, the Defendant Monsanto filed a Motion to Dismiss under Rule 12(b), F.R.C.P. and on grounds of forum non conveniens. Again,

no affidavit was attached to said Motion. There was an affidavit filed in conjunction with the Motion prematurely filed by Monsanto Company in March, 1978, namely the Affidavit by Louis Fernandez, but in that affidavit he merely swore that Monsanto Company did not lease, charter, or control the Vessel, "Borgny Dolphin", and that Aage Lasse Alvestad was not its employee. Those general statements applied only to Defendant Monsanto Company, and not to the Defendant Monsanto U.K.

18. Since the Defendants had failed to answer the interrogatories of the Plaintiffs or to produce the requested documents, the Plaintiffs began working through other sources in an effort to secure relevant documents. On October 16, 1979, A. R. Christovich, Jr., who represents the Occidental companies, sent certain documents to the Plaintiffs which are attached to the affidavit attached to this motion but in

said letter Mr. Christovich refused to provide the 3X Diving Contract, Occidental of Britain, Inc. letter to 3X concerning "Borgny Dolphin" work and a report of David Colomy concerning the "Borgny Dolphin", all of which were extremely relevant documents (said letter is attached hereto as Exhibit A-1). On January 28, 1980, Plaintiffs got out a subpoena duces tecum to A. R. Christovich of Occidental Petroleum Company, subpoenaing the documents in Occidental File No. 1-20-21, relative to the "Borgny Dolphin". A copy of said subpoena duces tecum is attached hereto as Exhibit A-2. Simultaneously, the Plaintiffs noticed the deposition of Mr. Christovich and noticed all parties of its intent to secure production of documents from Occidental Petroleum Company on February 11, 1980. Said notice is attached to this Motion as Exhibit A-3. On February 6, 1980, Mr. Christovich responded to the subpoena duces tecum by letter to Louis R. Koerner who,

at that time was Plaintiffs' Attorney In Charge; the sum and substance of the letter was that Mr. Christovich refused to appear on February 11, 1980. Said letter is attached hereto as Exhibit A-4.

19. In the meantime, this Court had placed on the Court's Motion Docket the Defendant Monsanto Company's Motion to Dismiss for January 28, 1980 and then reset the submission date to February 18, 1980. However, on February 18, 1980, Cynthia Norris of Mr. Koerner's office wrote Defendant attorney, Randy McClanahan, with carbon copy to the clerk, documenting the agreement of the parties "to pass the submission date of February 18, on the outstanding motions in the above referenced cause until after production of documents on February 29, 1980....after the production of documents, we will need to decide on a date for submission of the motions....In accordance with my agreement with you, I will copy the entire file which is produced during the document production and forward

same to you...I understand that you will not be in attendance but that Steven DeWolf of Vinson and Elkins will....by copy of this letter, I am advising the Court of our agreement...If you have any quetsions concerning the upcoming production of documents, please do not hesitate to call." (Said letter is attached hereto as Exhibit A-5). By virtue of the foregoing letter, the parties passed the submission date of February 18, 1980 and so far as we know no other submission date was ever reset by the Court nor by the parties prior to the Court ruling on the motions on August 20, 1980.

20. . . . On March 30, 1980, Mr. Martin R. David of Occidental International Oil, Inc., the person Mr. Cossey wrote and said would provide the documents, was written to set up an appointment on May 12, 1980 for the production of the documents. Said letter is attached hereto as Exhibit A-11. Copies of that letter were sent to Mr. McClanahan as well as Mr. Steven DeWolf and

Mr. Paul Brezac who is the Court coordinator for this Court. On April 14, 1980, Mr. Patton of the Occidental International Oil Company, Inc., with office in London, wrote to confirm the appointment of May 12, 1980 for the production of the documents in question. Said letter is attached hereto as Exhibit A-12.

21. Following production of the records on May 12, 1980 (said records and the relevance thereto are hereinafter discussed) Plaintiffs attorney in charge, Mr. Louis Koerner, went to trial in a complicated anti-trust case in June, 1980 in Pennsylvania (see Affidavit and sworn averments in Plaintiffs' Motion to reconsider previously filed with this Court, which Motion to reconsider and all attachments thereto are incorporated herein by reference). Realizing that said case was going to go on longer than he thought, Mr. Koerner, in July, 1980, asked Mr. Musslewhite to take over this case as attorney in charge, which

Mr. Musslewhite agreed to do. Within two weeks, Mr. Musslewhite was able to pick up a great portion of the file and immediately thereafter, on August 6, 1980, filed a Motion to Defer Determination of Defendants' Motions to Dismiss, which Motion to Defer is attached hereto as Exhibit B-1. Attached to that Motion to Defer was a Notice of Intent to Take Oral Depositions of relevant corporate officers of the Monsanto Defendants and the Dolphin Defendants, which Notice of Intent to Take Oral Deposition is attached hereto as Exhibit B-2. The depositions were set for August 26 and August 27, 1980. On August 11, 1980, this Court notified the Plaintiffs that their Motion to Defer would be placed on the Court's Written Motion Docket for September 1, 1980. Said Notice of the Court is attached hereto as Exhibit B-3. On August 20, 1980, despite the fact that this Court had not reset submission after the parties had agreed to pass the submission of February 18, 1980 (with

copies of such agreement to the court coordinator) and despite the fact that the Plaintiffs had filed a Motion to Defer and had noticed depositions for discovery with respect to Defendants' Motions and the Court had not ruled upon said Motion to Defer, and despite the fact that the only sworn affidavit filed in support of Defendants' motion was that of Louis Fernandez, which only referred to the Monsanto Company and did not refer to the Dolphin Defendants or Monsanto U.K., this Court entered a Memorandum and Order and Final Judgment dismissing this cause of action on the grounds that suit under the Death on the High Seas Act was barred by limitations and that the Jones Act suit would be dismissed on grounds of forum non conveniens and choice of law. Said Memorandum and Order is referred to for all purposes. On August 15, 1980, Plaintiffs filed their Motion to Reconsider Order Dismissing Cause of Action and Motion to Reinstate and Motion to Grant a New Trial.

Said Motion was placed upon the Courts "Written Motion Docket for October 6, 1980". Said Motion to reconsider and to reinstate is referred to for all purposes and incorporated herein by reference. The Notice of the Court setting the Motion on the Court's Written Motion Docket is incorporated herein by reference. Since October 6, 1980 would have been more than thirty days following the Court's final Judgment and Order of August 20, 1980 the Plaintiffs specially requested a hearing and the earliest date such hearing could be arranged was September 18, 1980, just one day before the 30 days from the final Judgment and Order would expire.

21. A hearing was had on September 18, 1980 and as such hearing began the Court stated that at the time it entered its Memorandum and Order of August 20, 1980 it was not aware of the Plaintiffs' Motion to Defer or the Notice of Depositions attached thereto.

The Court further indicated that it realized the Plaintiffs had a time limit with respect to filing an appeal. Because of such comments, Plaintiffs' counsel assumed that the Court was aware of the fact that Plaintiffs' time for appeal would expire the next day. Moreover, in view of the nature of the discussion that day, it appeared that the Court might favorably consider allowing further discovery, at least with respect to the Monsanto Defendants. Plaintiffs' counsel bona fidely and properly assumed that, when the Court did not rule on Friday, August 19, 1980, the last day for the plaintiffs to perfect its appeal, that the Court would at least partially grant Plaintiffs' Motion to Reinstate and Reconsider (see affidavit attached hereto as Exhibit C). Moreover, Plaintiffs were aware of this same Court's order in Eva Wilkinson v. Phillips Petroleum Company wherein tne Court had entered a judgment of dismissal. The Plaintiffs there had

filed a request for reconsideration and to reinstate that cause of action and because the Court did not rule on the 30th day, the Plaintiff filed its Notice of Appeal and the court entered an Order stating that it had no authority to consider the Motion to Reinstate because the Plaintiff had filed a notice of appeal, the Court being of the opinion that "this Court is without jurisdiction to consider plaintiffs' motion", citing Kirtlind v. J. Ray McDermott, Inc., 568 F.2d 1166, 1170 (5th Cir., 1978) and U.S. v. Dunbar, 611 F.2d 985, 987 (5th Cir. 1980). Said Order in Wilkinson v. Phillips Petroleum Company C.A.NO. H-78-673, is attached hereto as Exhibit B-5. Despite the fact that this Court in this case stated at the September 18 hearing that it was aware of the imminent running of the 30-day appeal period, the Court did not rule on September 19, 1980 and did not rule until September 22, 1980, three days after the 30-day period had expired. On that date the

Court entered an order denying the Plaintiffs' all relief. Said Order is attached hereto as Exhibit B-6.

22. At the time the Court entered its Memorandum and Order of August 20, 1980 and its Order denying Plaintiffs' Motion to Reinstate and Reconsider of September 22, 1980, the Court still, as far as we know, had not ruled on Plaintiffs' Motion to Compel the Monsanto Defendant to answer the unanswered question in the first set of interrogatories. Moreover, the Court had not ruled upon the Defendant's Motion for Protective Order filed by the Monsanto Defendants with respect to the Second Set of Interrogatories and Request for Production of Documents submitted by the Plaintiffs to the Monsanto Defendants. Moreover, this Court had never reset a submission date on the "Written Motion Docket" or set an oral hearing date for the various Motions to Dismiss and/or for Summary Judgment of the Defendants. Moreover, the Court had not

ruled on the Plaintiffs' previously filed Motion to Defer and Notice of Deposition of the corporate officers of the Defendants for depositions with respect to their various Motions to Dismiss. . . .

APPENDIX 9

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MRS. AAGE LASSE ALVESTAD, ET AL	:	
Plaintiffs,	:	
VS.	:	C.A. NO. H-79-1883
MONSANTO COMPANY, ET AL,	:	(Filed Oct. 20, 1980)
Defendants	:	

NOTICE OF APPEAL

Notice is hereby given that the above-named Plaintiffs hereby appeal to the United States Court of Appeals for the Fifth Circuit from the judgment entered in this cause of action on the 22nd day of September, 1980, by Judge Norman W. Black.

Respectfully submitted,

LAW OFFICES OF
BENTON MUSSLEWHITE, INC.
3506 Travis Street
Houston, Texas 77002
(713) 520-0621

SIGNED/BENTON MUSSLEWHITE

Attorney in Charge for
Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Notice of Appeal has been forwarded to all counsel of record by placing a copy of same in the United States Mail, postage prepaid and properly addressed, all on this the 17th day of October, 1980.

S/BENTON MUSSLEWHITE

APPENDIX 10

LAW OFFICES OF
LOUIS R. KOERNER, JR.
A PROFESSIONAL LAW CORPORATION
730 CAMP STREET
NEW ORLEANS, LOUISIANA 70130

February 18, 1980

Randy McClanahan, Esq.
Baker & Botts, Esqs.
1 Shell Plaza
Houston, Texas 77002

Re: Mrs. Aage Lasse Alvestad, et al v. Monsanto Company, et al
Civil Action No. H-79-1883

Dear Randy:

This letter is to confirm our conversation this morning in which you agreed to pass the submission date on February 18th on the outstanding Motions in the above referenced case until after production of documents on February 29, 1980. After production of the documents, we will need to decide on a date for submission of the Motions.

In accordance with my agreement with you, I will copy the entire file which is produced during the document production and forward same to you. I understand that you will not be in attendance, but that Steve DeWolf of Vinson & Elkins will.

By copy of this letter, I am advising the Court of our agreement. I attempted to reach the Clerk's office today but apparently due to the holiday, the office was closed, as there was no answer. I will contact the Court on February 19th with regard to this matter. If you have any questions concerning the upcoming production of documents, please do not hesitate to call.

With kindest personal regards, I remain

Sincerely,

S/Cynthia A. Norris

CAN:tc

cc: Jesse E. Clark, Clerk

APPENDIX 11

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MRS. AAGE LASSE ALVESTAD, Individually and as Representative of the Estate of AAGE LASSE ALVESTAD, and their Minor Daughter,	:	
Plaintiffs	:	C.A. NO. H-79-1883
VS.	:	(Filed Aug. 6, 1980)
MONSANTO COMPANY, ET AL	:	

MOTION TO DEFER DETERMINATION OF DEFENDANTS' MOTIONS TO DISMISS UNDER RULE 12b OF F.R.C.P., ON GROUNDS OF FORUM NON CONVENIENS AND ON GROUNDS OF LIMITATIONS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiff, by and through their attorney of record, and files this Motion to Defer Determination of Defendants' Motions to Dismiss under Rule 12b of F.R.C.P., on grounds of forum non conveniens, and on grounds of limitations and as grounds therefor

would respectfully show unto this Honorable Court the following, to-wit:

I.

Defendants have filed a Motion to Dismiss under Rule 12b of Federal Rules of Civil Procedure, on grounds of forum non conveniens and on grounds of limitations.

II.

Movant would show that he is filing additional briefs and undertaking additional discovery concerning jurisdictional matters in order to develop the facts in this case that were considered relevant in Susan Keane, et al v. Global Marine, Inc., et al, C.A. No. H-77-1006, U.S.D.C. S.D., Tx., Houston Division, Honorable John V. Singleton's Memorandum and Order dated October 24, 1978.

III.

In this connection, Movant would show that he is filing Notices of Deposition, a copy attached hereto, of the officers, agents and/or employers of Defendants with

the most knowledge of facts relevant to a determination of Defendants' Motions to Dismiss. The completion of this discovery is necessary in order that Movant can properly respond to Defendants' Motions. As held by the Supreme Court of the United States in Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 48 L.Ed.2d 335, 96 S.Ct. 1848 (1976), to-wit:

> "Dismissals prior to giving the Appellant ample opportunity for discovery should be granted very sparingly."

See also Illinois State Employees Union Counsel 34 AFL-CIO v. Lewis, 473 F.2d 461 (7th Cir. 1972) cert. den'd. 1973, to-wit:

> "Nor should such (dismissal motions) be entered until the party opposing the motion has had a fair opportunity to conduct such discovery as may be necessary to meet the factual basis for the motion..."

IV.

Movant would show that counsel for Defendants do not agree to this Motion and are opposed to same.

WHEREFORE, PREMISES CONSIDERED, Movant prays the Court defer ruling on Defendants'

Motions to Dismiss for one-hundred and ninety (190) days, or, in the alternative, until November 21, 1980.

Respectfully submitted,

LAW OFFICES OF
BENTON MUSSLEWHITE,
INC.

S/BENTON MUSSLEWHITE
3506 Travis Street
Houston, Texas 77002
(713)520-0621

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Notice of Intent to Take Oral Depositions has been p-ovided all counsel of record on this the 6th day of August, 1980.

S/BENTON MUSSLEWHITE

APPENDIX 11 - continued

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MRS. AAGE LASSE ALVESTAD, Individually and as Representative of the Estate of AAGE LASSE ALVESTAD, and their Minor Daughter, Plaintiffs	:	C.A. NO. H-79-1883
VS.	:	
MONSANTO COMPANY, ET AL	:	

NOTICE OF INTENT TO TAKE ORAL DEPOSITIONS

TO: Defendant, Monsanto Company, by and through its attorney of record, Steven DeWolf of Vinson & Elkins, 2100 First City National Bank Bldg., Houston, Texas 77002

Defendants, Dolphin Int'l, S.A. and Dolphin Int'l, Inc. and Monsanto Oil Company of the U.K., Inc., by and through their attorney of record, Randy J. McClanahan of Baker & Botts, 3000 One Shell Plaza, Houston, Texas 77002.

PLEASE TAKE NOTICE that, pursuant to Rules 26 and 30, Federal Rules of Civil Procedure, the Plaintiff, by and through his attorney of record, BENTON MUSSLEWHITE, will take the oral deposition, before an

officer authorized to administer oaths,

of the following:

A. The corporate officer(s), agent(s), and/or employee(s) of Defendant Monsanto Company that would have the most knowledge of the corporate relationships between it and:

   1. Monsanto Oil Company of the U.K., Inc.

   2. Dolphin Int'l, Inc. and Dolphin Int'l., S.A.;

B. The corporate officer(s), agent(s), and/or employee(s) of Defendant Monsanto Oil Company of the U.K., Inc. that would have the most knowledge of the corporate relationships between it and:

   1. Monsanto Company;

   2. Dolphin Int'l., Inc. and Dolphin Int'l., S.A.;

C. The corporate officer(s), agent(s), and/or employee(s) of Defendants Dolphin Int'l., Inc. and Dolphin Int'l, S.A. that would have the most knowledge of the corporate relationships between it and

   1. Monsanto Company

   2. Monsanto Oil Company of the U.K., Inc.

particularly as their relationship pertains

to the ownership and control of the vessel

upon which the decedent, Aage Lasse Alvestad was serving at the date of his death, March 22, 1975. . . .

The depositions will take place on the 26 and 27 day of August, 1980 at 9:00 o'clock a.m. in the office of Robert A. Chaffin, 3500 Travis, Houston, Texas 77002 and continue from day to day until completed.

No subpoena duces tecum is necessary since the deposed are parties to this suit.

You are invited to attend and cross-examine.

Respectfully submitted,

LAW OFFICES OF
BENTON MUSSLEWHITE,
INC.

S/Benton Musslewhite
3506 Travis St.
Houston, Texas 77002
(713)520-0621

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Notice of Intent to Take Oral Depositions has been provided all counsel of record on this

6th day of August, 1980.

S/Benton Musslewhite

APPENDIX 12

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
OFFICE OF THE CLERK

JESSE E. CLARK
CLERK

P. O. Box 61010
Houston, Texas 77208

August 11, 1980
date

Re: Civil Action H-79-1883

MRS. AAGE LASSE ALVESTAD v. MONSANTO COMPANY, ET AL

PLEASE BE ADVISED that Plaintiff's Motion to Defer Determination of Defts' Motions to Dismiss under Rule 12b, F.R.C.P., on Grounds of Forum Non Conveniens and on Grounds of Limitations, filed August 11, 1980

has been placed on this Court's Written Motion Docket for Sep 1, 1980.

ALL RESPONSES to said pleading ARE DUE ON OR BEFORE this date. Motions will be considered by the Court on the written documents presented by counsel WITHOUT the necessity of a personal appearance by counsel. Copies of the Court's decision will be forwarded to all counsel of record.

REQUEST FOR ORAL PRESENTATION of motions will be considered by the Court on or after the submission date stated above. However, nnless notified by the Clerk, counsel will presume that no oral hearing is permitted.

Very truly yours,

JESSE E. CLARK, CLERK
By: S/P. Robinson, deputy

cc: All counsel of record

APPENDIX 13

- - - - - - - -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
OFFICE OF THE CLERK

JESSE E. CLARK
CLERK

P. O. Box 61010
Houston, Texas 77208

August 15, 1980
date

Re: Civil Action H-79-1883

MRS. AAGE LASSE ALVESTAD v. MONSANTO COMPANY, ET AL

JUDGE NORMAN W. BLACK

PLEASE BE ADVISED that Pltfs MOTION To RECONSIDER ORDER DISMISSING CAUSE OF ACTION and MOTION To REINSTATE And MOTION To GRANT A NEW TRIAL

has been placed on this Court's Written Motion Docket for Oct 6, 1980.

ALL RESPONSES to said pleading ARE DUE ON OR BEFORE this date. Motions will be considered by the Court on the written documents presented by counsel WITHOUT the necessity of a personal appearance by counsel. Copies of the Court's decision will be forwarded to all counsel of record.

REQUEST FOR ORAL PRESENTATION of motions will be considered by the Court on or after the submission date stated above. However, unless notified by the Clerk, counsel will presume that no oral hearing is permitted.

Very truly yours,
JESSE E. CLARK, CLERK

By: S/A. Daniel, deputy

cc: All counsel
of record

APPENDIX 14

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

April 12, 1978

MRS. AAGE LASSE ALVESTAD, ETC.	:	
VS.	:	CIVIL NO. S-78-23-CA
MONSANTO CO., ET AL	:	

The following motion was filed on April 12, 1978:

PLAINTIFF'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES.

There was evidence received of the necessary service of motion on the adverse parties. No Motion will be presented to the Judge until indication of service is received by the Clerk and the proper time has elapsed as governed by the Rules of this Court. Indication of service is usually given by a statement at the bottom of the motion, below the signature, showing the date a copy of the motion was mailed to adverse party. This statement should be signed.

All Motions, except those hereafter listed, are to be answered within ten (10) days, unless otherwise allowed by the Court or some applicable rule of the Federal Rules of Civil Procedure. The following motions do not require an answer:

1. Motion to Withdraw or Appear as Counsel;
2. Motion for Extension of Time;
3. Motion to Amend Pladings (unless additional parties are being added).
4. Joint Motions.

THE LOCAL RULE is to consider motions on the pleadings, without oral hearing, unless on showing good cause an oral hearing is granted. Request for oral hearing, if any, should be made when the motion, or the reply is filed. If oral hearing is granted, the Judge will set a date for same and the interested attorneys will be notified.

THE JUDGE desires that memorandum briefs containing authorities relied on as to

matters raised in the motion be filed by the respective parties before the motion is submitted.

Please note also that it is the Court's rule on all documents including forms of orders and judgments, be sent to the Clerk's office and not directly to the Judge.

IF YOU DO NOT DESIRE TO OPPOSE THE ABOVE MOTION, PLEASE INFORM THE CLERK BY LETTER.

MURRAY L. HARRIS, CLERK

S/Shirley Davis
(Mrs.) Shirley Davis,
Deputy Clerk

cc: Mr. Richard E. Gray
Thompson, Knight, Simmons & Bullion
Attorneys at Law
2300 Republic National Bank Bldg.
Dallas, Texas 75201

Mr. R. M. Sharpe, Jr.
Sharpe & Associates
Attorneys at Law
1553 Esperson Building
815 Walker St.
Houston, Texas 77002.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Office - Supreme Court, U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-498

MRS. AAGE LASSE ALVESTAD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF AAGE LASSE ALVESTAD, AND THEIR MINOR DAUGHTER
Petitioner,

VS.

MONSANTO COMPANY, MONSANTO OIL COMPANY OF THE U.K., INC., DOLPHIN INTERNATIONAL, INC., AND DOLPHIN INTERNATIONAL, S.A.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT MONSANTO COMPANY'S BRIEF IN OPPOSITION

EUGENE J. SILVA,
Counsel of Record
2600 First City Tower
Houston, Texas 77002
713/651-2014

MARIE R. YEATES
2600 First City Tower
Houston, Texas 77002
713/654-4576

Counsel for Respondent
MONSANTO COMPANY

OF COUNSEL:

VINSON & ELKINS
2600 First City Tower
Houston, Texas 77002
713/651-2222

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the decision of the United States Court of Appeals for the Fifth Circuit dismissing as untimely the appeal from the Final Judgment in this case properly follows the most recent case law from the Fifth Circuit and other Circuits construing the 1979 amendment to Rule 4(a)(5), Federal Rules of Appellate Procedure, to require that neither a tardy notice of appeal nor a motion for reconsideration under Rule 60(b), Federal Rules of Civil Procedure, may constitute a motion for extension of time to file a notice of appeal.

II.

Whether the Fifth Circuit, in dismissing as untimely Petitioner's appeal from the Final Judgment, properly articulated and applied the "unique circumstances" exception of Harris Truck

Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962), and Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964), pursuant to which an untimely appeal will not be dismissed if the failure timely to file the notice of appeal is due to reliance on statements or actions taken by the district court which generate a reasonable belief that an appeal may be properly initiated at a later date.

III.

Whether the Fifth Circuit, in its review of the District Court's denial of Petitioner's Motion for Reconsideration under Rule 60(b), Federal Rules of Civil Procedure, properly articulated and applied the abuse of discretion standard of review in upholding the district court's denial of that Motion.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
REASONS WHY THE WRIT SHOULD BE DENIED	9
I. THE DECISION OF THE FIFTH CIRCUIT DISMISSING AS UNTIMELY THE APPEAL FROM THE FINAL JUDGMENT PROPERLY FOLLOWS THE MOST RECENT DECISIONS FROM THE FIFTH CIRCUIT AND OTHER CIRCUITS CONSTRUING THE 1979 AMENDMENT TO RULE 4(a)(5), FEDERAL RULES OF APPELLATE PROCEDURE, TO REQUIRE THAT NEITHER A TARDY NOTICE OF APPEAL NOR A MOTION FOR RECONSIDERATION UNDER RULE 60, FEDERAL RULES OF CIVIL PROCEDURE, MAY CONSTITUTE A MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL	9
II. THE FIFTH CIRCUIT, IN DISMISSING PETITIONER'S APPEAL FROM THE FINAL JUDGMENT, PROPERLY ARTICULATED AND APPLIED THE "UNIQUE CIRCUMSTANCES" EXCEPTION OF HARRIS TRUCK LINES, INC. V. CHERRY MEAT PACKERS, INC., 371 U.S. 215 (1962), AND THOMPSON V. IMMIGRATION AND NATURALIZATION SERVICE, 375 U.S. 384 (1964), PURSUANT TO WHICH AN UNTIMELY APPEAL WILL NOT BE DISMISSED IF THE FAILURE TIMELY TO FILE THE	

Page(s)

NOTICE OF APPEAL IS DUE TO RELIANCE ON ACTION TAKEN BY THE DISTRICT COURT WHICH GENERATES A REASONABLE BELIEF THAT AN APPEAL MAY PROPERLY BE INITIATED AT A LATER DATE 22

III. THE FIFTH CIRCUIT, IN ITS REVIEW OF THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION FOR RECONSIDERATION UNDER RULE 60(b), FEDERAL RULES OF CIVIL PROCEDURE, PROPERLY ARTICULATED AND APPLIED THE ABUSE OF DISCRETION STANDARD OF REVIEW IN UPHOLDING THE DISTRICT COURT'S DENIAL OF THAT MOTION FOR RECONSIDERATION ... 33

CONCLUSION AND PRAYER 42

CERTIFICATE OF SERVICE 45

TABLE OF AUTHORITIES

	Page(s)
Bond v. Western Auto Supply Co., 654 F.2d 302 (5th Cir. 1981)	11, 18
Brennan v. Medwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971)	36
Briggs v. Lucas, 678 F.2d 612 (5th Cir. 1982)	11, 19-20
Brooks v. Britton, 669 F.2d 665 (11th Cir. 1982)	11, 21
Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257 (1978)	12, 13, 15
Cel-a-Pak v. California Agricultural Labor Relations Board, 680 F.2d 664 (9th Cir. 1982)	15
Chipser v. Kholmeyer & Co., 600 F.2d 1061 (5th Cir. 1979)	25
Compton v. Alton S.S. Co., 608 F.2d 96 (4th Cir. 1979)	37
Fox v. Brewer, 620 F.2d 177 (8th Cir. 1980)	37
Fackelman v. Bell, 564 F.2d 734 (5th Cir. 1977)	36, 37
Gribble v. Harris, 625 F.2d 1173 (5th Cir. 1980)	29
Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962)	i-ii, 22, 23, 26

Page(s)

Hernandez-Rivera v. Immigration & Naturalization Service, 630 F.2d 1352 (9th Cir. 1980) 27

Mayfield v. United States Parole Commission, 647 F.2d 1053 (10th Cir. 1981) 11, 19

Meadows v. Cohen, 409 F.2d 750 (5th Cir. 1969) 37

National Industries, Inc. v. Republic National Life Ins. Co., 677 F.2d 1258 (9th Cir. 1982) 24

Needham v. White Laboratories, Inc., 639 F.2d 394 (7th Cir.), cert. denied, 102 S.Ct. 427 (1981) 12-15, 25, 27, 32

Pettibone v. Cupp, 666 F.2d 333 (9th Cir. 1981) 11, 18, 19

Pierre v. Jordan, 333 F.2d 951 (9th Cir.), cert. denied, 379 U.S. 974 (1964) 29

Reynolds v. Hunt Oil Co., 643 F.2d 1042 (5th Cir. 1981) 13

St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co., 684 F.2d 691 (10th Cir. 1982) 14

Sanchez v. Board of Regents, 625 F.2d 521 (5th Cir. 1980) 18

Sanchez v. Dallas Morning News, 543 F.2d (5th Cir. 1976) 18

Seven Elves, Inc. v. Eskenazi, 635 F.2d 396 (5th Cir. 1981) 35

	Page(s)
Silk v. Sandoval, 435 F.2d 1266 (1st Cir. 1971)	37
Swam v. United States, 327 F.2d 431, (7th Cir.), cert. denied, 379 U.S. 852 (1964)	37
Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964)	ii, 22-24, 26
Vine v. Beneficial Finance Co., 374 F.2d 627 (2d Cir.), cert. denied, 389 U.S. 970 (1967)	29-30
Wyzik v. The Employee Benefit Plan of Crane Co., 663 F.2d 348 (1st Cir. 1981)	11, 19
Federal Rules of Civil Procedure	
Rule 50(b)	14
Rule 52(b)	14
Rule 56(b)	41
Rule 59	5
Rule 59(a)	14
Rule 59(b)	15
Rule 59(e)	14
Rule 60	5, 9
Rule 60(b)	i, ii, 6-9, 11, 15, 33-37, 40
Rule 60(b)(1)	35
Rule 60(b)(4)	35, 38
Rule 60(b)(6)	35
Federal Rules of Appellate Procedure	
Rule 3	12
Rule 4	12, 31
Rule 4(a)	13, 16-19, 22
Rule 4(a)(4)	13-14

	Page(s)
Rule 4(a)(5)	i, 9, 11, 12, 16, 20
Rule 26(b)	13
46 U.S.C. § 688	1
46 U.S.C. § 761 et seq.	1
6 Moore's Federal Practice ¶ 56.23 (2d ed. 1978)	41
7 Moore's Federal Practice ¶ 60.25[2] (2d ed. 1982)	38

The Respondent, Monsanto Company, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 671 F.2d 908.

STATEMENT OF THE CASE

Petitioner, a Norwegian citizen and resident, filed suit in January 1978, alleging that Mr. Aage Lasse Alvestad, also a Norwegian citizen and resident, died while working as a diver in connection with North Sea operations of the drilling vessel BORGNY DOLPHIN. Petitioner alleged that Mr. Alvestad's death was caused by the unseaworthiness of that drilling vessel and the negligence of Respondents. Petitioner sought relief under the Jones Act, 46 U.S.C. § 688, the Death on the High Seas Act, 46 U.S.C. § 761 et seq., and the general maritime law. Suit was filed within

three years of the date of the accident but over two years after that date.[1/]

On March 15, 1978, Respondent Monsanto Company, one of the initially-named Defendants, filed a Motion to Dismiss and/or Motion for Summary Judgment, as well as a brief and affidavit in support thereof.[2/] Monsanto Company subsequently filed on May 30, 1978, its answers to Interrogatories propounded by Petitioner, interposing objections to some of those Interrogatories.

After having been belatedly served in July 1978, Respondent Monsanto Oil

---

[1/] As Petitioner admits in her Petition for Writ of Certiorari, the District Court properly determined that her claim under the Death on the High Seas Act was barred by the applicable two-year statute of limitations.

[2/] This is the "prematurely filed" motion for summary judgment referred to in the Petitioner's Petition for Writ of Certiorari.

Company of the U.K., Inc. filed a Motion to Dismiss on the grounds of Petitioner's failure to state a claim upon which relief can be granted, the applicability of foreign law and forum non conveniens, the expiration of the statute of limitations and improper venue. In November of that year, Petitioner filed answers to Interrogatories propounded by Monsanto Oil Company of the U.K., Inc. Subsequently in November 1979, Monsanto Oil Company of the U.K., Inc. filed another Motion to Dismiss on grounds of the expiration of the statute of limitations.

In January, 1980, Monsanto Company filed a second Motion to Dismiss on the grounds of forum non conveniens, attaching an affidavit to its Memorandum in Support of that Motion, filed in July, 1980. Respondents Dolphin International, Inc. and Dolphin International,

S.A., having been first named as Defendants in November, 1979, filed their Motions to Dismiss in January, 1980, on the basis of the expiration of the applicable statutes of limitations.

On August 6, 1980, without ever having responded to any of the Respondents' various Motions to Dismiss, some of which had, by that time, been pending for two years, Petitioner filed a Motion to Defer Ruling on Respondents' Motions to Dismiss until additional discovery could be completed. Aside from this Motion to Defer Determination, Petitioner filed no opposition to any of the several Motions to Dismiss and/or Motions for Summary Judgment filed by Respondents.

On August 20, 1980, Judge Norman W. Black, sitting in the Southern District of Texas, entered a Memorandum and Order granting Respondents' Motions to Dismiss.

The District Court held (1) the two-year statute of limitations applicable to the Death on the High Seas Act had expired prior to Petitioner's filing suit, thus barring relief under that statute; (2) any general maritime law claim was foreclosed because the Death on the High Seas Act excludes a general maritime law remedy; (3) and, in any event, foreign law, and not American law, is applicable to the Petitioner's claims and these claims should be dismissed on the basis of forum non conveniens. A Final Judgment to that effect was entered on August 20, 1980.

On September 10, 1980, more than ten days after the entry of the Court's Final Judgment, Petitioner filed a "Motion to Reconsider Order of the Court Dismissing Cause of Action and to Reinstate Cause of Action and Motion to Grant a New Trial Pursuant to Rules 59

and 60 of F.R.C.P." A hearing on that motion was held on September 18, 1980.

The District Court denied the Petitioner's Motion to Reconsider on September 22, 1980, giving the following statement of reasons:

> Plaintiff filed this action originally on January 31, 1978. On August 20, 1980, the Court dismissed the complaint based upon limitations, lack of subject matter jurisdiction, and forum non convenience [sic]. At a conference on September 18, 1980, although Plaintiff argued that [she] needed more time for discovery, [her] main argument was with Fifth Circuit precedent.
>
> Additional discovery could not aid Plaintiff in this matter. Plaintiff's argument is legal, not factual, and this Court is not in a position to change Fifth Circuit law.

Petitioner filed a second Rule 60(b) Motion for Relief in the District Court on October 16, 1980. On October 20, sixty days after the District Court's entry of its Final Judgment,

Petitioner filed a notice of appeal.[3/] On December 16, 1980, the District Court denied Petitioner's second Rule 60(b) motion for relief, noting that Petitioner had filed a "proper notice of appeal" and thus the District Court was without jurisdiction. On January 9, 1981, Petitioner filed a notice of appeal from the District Court's December 16th order denying Petitioner's

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[3/] The Petitioner makes extensive arguments in her Petition for Writ of Certiorari concerning the Fifth Circuit's failure to recognize that her notice of appeal was filed on the sixtieth day after the entry of the Final Judgment and not on the sixty-first day as indicated by the Fifth Circuit's decision. However, as is subsequently discussed in detail, the filing of the notice of appeal on the sixtieth day does not make the appeal timely in any event, and thus any "miscalculation" by the Fifth Circuit did not affect the propriety of its ultimate decision that Petitioner's appeal was untimely. The Fifth Circuit evidently recognized this fact, since it failed to grant rehearing after Petitioner, in her Petition for Rehearing before that Court, pointed out this computational error.

second Motion for Relief. The two appeals were consolidated and the Fifth Circuit rendered its decision on April 1, 1982.

In its decision, the Fifth Circuit dismissed as not timely the Petitioner's appeal from the Final Judgment, finding no unique circumstances justifying her failure to file a timely appeal. Although the Fifth Circuit determined the appeal from the District Court's denial of Petitioner's first Rule 60(b) Motion for Reconsideration to be timely, it found no abuse of discretion in the District Court's denial of that motion, and thus affirmed the District Court's decision. On May 17, 1982, the Fifth Circuit denied a Petition for Rehearing and Rehearing En Banc filed by Petitioner.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE DECISION OF THE FIFTH CIRCUIT DISMISSING AS UNTIMELY THE APPEAL FROM THE FINAL JUDGMENT PROPERLY FOLLOWS THE MOST RECENT DECISIONS FROM THE FIFTH CIRCUIT AND OTHER CIRCUITS CONSTRUING THE 1979 AMENDMENT TO RULE 4(a)(5), FEDERAL RULES OF APPELLATE PROCEDURE, TO REQUIRE THAT NEITHER A TARDY NOTICE OF APPEAL NOR A MOTION FOR RECONSIDERATION UNDER RULE 60, FEDERAL RULES OF CIVIL PROCEDURE, MAY CONSTITUTE A MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL.

The Petitioner contends that the Fifth Circuit erroneously failed to deem timely her notice of appeal from the Final Judgment since her tardy notice of appeal and/or her Rule 60(b) Motions For Reconsideration are equivalent to a motion to extend the time to file a notice of appeal. According to Petitioner, had the Fifth Circuit properly determined that her notice of appeal was filed on the sixtieth, instead of the sixty-first day, after the entry of the Final Judgment, it

would have found her appeal timely because a tardy notice of appeal, filed within sixty days of the Final Judgment, may constitute a motion for an extension of time to file a notice of appeal. Petitioner expresses her surprise that, after she pointed out this computational error to the Fifth Circuit in her Petition for Rehearing before that Court, the Fifth Circuit failed to grant rehearing to correct that error and consequently to find her appeal timely. Claiming that the Fifth Circuit's ruling finding her appeal to be untimely is contrary to Fifth Circuit precedent and cases from other Circuits liberally construing tardy notices of appeal as motions for extension of time to appeal, Petitioner urges this Court to grant a writ of certiorari to correct this error.

Petitioner's argument is wholly without merit. As the Fifth Circuit and

four other Circuit courts have recently recognized, after the 1979 amendment to Rule 4(a)(5), Federal Rules of Appellate Procedure, the appellate court is no longer empowered to treat a tardy notice of appeal or a Rule 60(b) Motion for Reconsideration as a motion for an extension of time to file an appeal. Bond v. Western Auto Supply Co., 654 F.2d 302 (5th Cir. 1981); Briggs v. Lucas, 678 F.2d 612 (5th Cir. 1982); Wyzik v. The Employee Benefit Plan of Crane Co., 663 F.2d 348 (1st Cir. 1981); Pettibone v. Cupp, 666 F.2d 333 (9th Cir. 1981); Mayfield v. United States Parole Commission, 647 F.2d 1053 (10th Cir. 1981); Brooks v. Britton, 669 F.2d 665 (11th Cir. 1982). Therefore, even had the Fifth Circuit properly determined that Petitioner's notice of appeal was filed on the sixtieth day after entry of the Final Judgment, her appeal from the Final Judgment would neverthe-

less not have been timely. Because the Fifth Circuit well understood the effect of the 1979 amendment to Rule 4(a)(5), that Court appropriately considered it unnecessary to grant Petitioner's request for rehearing in order to correct a computational error which would not have rendered timely Petitioner's appeal or altered the ultimate decision of the Fifth Circuit.

Pursuant to the Federal Rules of Appellate Procedure, an appeal is taken by filing a timely notice of appeal with the district court. Fed.R.App.P. 3. That notice must be filed within thirty days from the date of entry of the judgment or order from which the appellant appeals. Fed.R.App.P. 4. Compliance with Rule 4 is mandatory and jurisdictional. Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257, 264 (1978); Needham v. White Laboratories, Inc., 102 S.Ct. 427,

428 (Rehnquist, J. dissenting from denial of writ of certiorari). "The clear purpose of Rule 4(a) is to set a definite point in time when litigation shall be at an end, so that the prospective appellee will know that he is freed of the appellant's demands." Needham v. White Laboratories, Inc., 102 S.Ct. at 428, citing Browder v. Director of Department of Corrections of Illinois, supra. The Court of Appeals is barred from extending that time period for filing a notice of appeal. Fed.R.App.P. 26(b). Reynolds v. Hunt Oil Co., 643 F.2d 1042 (5th Cir. 1981).

There exist only a limited number of mechanisms for delaying the time period for filing a notice of appeal. The running of that period for filing a notice of appeal may be tolled by the timely filing of certain designated post-trial motions. Fed.R.App.P. 4(a)(4).

The four motions, the timely filing of which operates to toll the running of the thirty-day period to file a notice of appeal, are the following: a motion for new trial under Rule 59(a), Fed.R. Civ.P., a motion to alter or amend the judgment under Rule 59(e), Fed.R. Civ.P., a motion under Rule 52(b), Fed.R.Civ.P., to amend or make additional findings of fact, and a motion for judgment notwithstanding the verdict under Rule 50(b), Fed.R.Civ.P. See Needham v. White Laboratories, Inc., 102 S.Ct. at 428; St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co., 684 F.2d 691 (10th Cir. 1982). These motions are timely if filed within ten days of the Final Judgment.

As the Fifth Circuit recognized, Petitioner's Motion for a New Trial Under Rule 59(a) was not timely filed within ten days of the Final Judgment,

Fed.R.Civ.P. 59(b), and thus did not effect a tolling of the period for filing the appeal. Petitioner's Rule 60(b) Motions, regardless of whether timely filed, did not toll the running of the time period for filing the notice of appeal, since the filing of a Rule 60(b) Motion "never tolls the notice of appeal time." Needham v. White Laboratories, Inc., 639 F.2d 394, 397 n.4 (7th Cir.), cert. denied, 102 S.Ct. 427 (1981). See Browder v. Director, Department of Corrections of Illinois, 434 U.S. at 263 n.7. Furthermore, a Rule 60(b) motion does not itself constitute a notice of appeal. Cel-a-Pak v. California Agricultural Labor Relations Board, 680 F.2d 664 (9th Cir. 1982). Thus, Petitioner filed neither a timely notice of appeal, nor any post-judgment motions which effected a delay

in the time for filing her notice of appeal.

The only other available statutory mechanism for extending the thirty-day period for filing the notice of appeal is the filing of a motion under Rule 4(a)(5), Fed.R.App.P., for an extension of time to file the notice of appeal. Rule 4(a)(5) permits the

> district court, upon a showing of excusable neglect or good cause, [to] extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by Rule 4(a).

Rule 4(a)(5), Fed.R.App.P. (Supp. 1979) (emphasis added). Pursuant to this Rule, a motion for extension of time must be filed within the thirty-day grace period following the thirty-day period for filing the notice of appeal, or within sixty days of the entry of the Final Judgment.

It is undisputed that Petitioner filed no such motion for an extension of time. However, Petitioner argues that the Fifth Circuit should have considered her tardy notice of appeal, filed on the sixtieth day after the entry of the Final Judgment, and/or her Motions for Reconsideration as the equivalent of a motion for an extension of time to file the notice of appeal. The case law supporting this proposition, cited by Petitioner, interprets Rule 4(a), Fed.R.App.P., prior to the August 1979 amendment to that Rule. That case law has now been rejected in a series of decisions from five different Circuits in which the Courts of Appeal have unanimously interpreted the 1979 amendment to Rule 4(a) to require that an actual motion for extension of time be filed. Neither the tardy notice of appeal nor a motion for reconsideration

may substitute for the motion for an extension of time. As the Fifth Circuit stated in Bond v. Western Auto Supply Co., supra:

> We did indeed extend such clemency [i.e., treating the untimely notice of appeal as a timely motion for extension], upon a showing of excusable neglect, in those cases in which the notice itself had been filed prior to the amendment of Rule 4(a) in August 1979. Sanchez v. Board of Regents, 625 F.2d 521, 522-23 (5th Cir. 1980). See Sanchez v. Dallas Morning News, 543 F.2d 556, 557 n.2 (5th Cir. 1976) and cases cited therein. Rule 4(a) now expressly requires that an actual motion for an extension be filed with the district court.

Bond v. Western Auto Supply Co., 654 F.2d at 303 (emphasis added).

The Ninth Circuit, addressing the same issue in Pettibone v. Cupp, supra, stated:

> We are bound by the language of the 1979 amendment and its clear requirement of "a motion filed not later than 30 days after the expiration of the

> time prescribed by this Rule 4(a)." We believe this language means what it says. Indeed the Notes of the Advisory Committee on Appellate Rules state that the amendment was intended to require a formal motion, as opposed to the less formal procedure under the Rule prior to amendment.

Pettibone v. Cupp, 666 F.2d at 335 (emphasis added). As the First Circuit recognized in Wyzik v. The Employee Benefit Plan of Crane Co., supra, the August 1979 amendment to Rule 4(a) "preclude[s] such 'substantial equivalence' analysis" as that suggested by Petitioner. Wyzik v. The Employee Benefit Plan of Crane Co., 663 F.2d at 348. Accordingly, the Fifth Circuit was not empowered to treat Petitioner's tardy notice of appeal or motions for reconsideration as the equivalent of a motion for extension of time to file the appeal. Mayfield v. United States Parole Commission, supra; Briggs v.

Lucas, supra. Petitioner's notice of appeal filed on the sixtieth day after the entry of the Final Judgment could not be deemed to constitute a Rule 4(a)(5) motion for extension of time to file a notice of appeal.

Pursuant to Rule 4(a)(5), if the motion for extension of time to file the notice of appeal is timely made, the district court may grant such an extension upon a showing of excusable neglect or good cause in failing timely to file the notice of appeal. Petitioner contends that the Fifth Circuit erroneously failed to treat the District Court's statement, made in its December 16th denial of Petitioner's second Motion for Reconsideration, that Petitioner had filed a "proper notice of appeal," as an implied finding of excusable neglect or good cause with respect to Petitioner's tardy notice of appeal.

However, where the appellant "failed to properly move for an extension of time to file his notice of appeal, any implicit finding of excusable neglect by the district court is ineffectual." Brooks v. Britton, 669 F.2d at 667. Accordingly, even if the District Court's statement concerning Petitioner's filing of a "proper notice of appeal" could be construed as an implicit finding of excusable neglect, any such implicit finding is irrelevant because Petitioner failed to make a proper, timely motion for extension of time to file a notice of appeal.

It is, therefore, apparent that the Fifth Circuit's ruling finding the Petitioner's appeal from the Final Judgment to be untimely is in accord not only with Fifth Circuit precedent, but with the unanimous decisions of all of the other Circuits which have addressed

this issue. The cases cited by Petitioner with respect to her assertion of Fifth Circuit error are out-dated by the 1979 amendment to Rule 4(a) and are overruled by subsequent Circuit court decisions construing that amendment. Given the recent unanimous case law from five Circuits addressing this very issue, there is certainly no need to grant a writ of certiorari on this point which was correctly, albeit implicitly, decided by the Fifth Circuit in this case.

II.

THE FIFTH CIRCUIT, IN DISMISSING PETITIONER'S APPEAL FROM THE FINAL JUDGMENT, PROPERLY ARTICULATED AND APPLIED THE "UNIQUE CIRCUMSTANCES" EXCEPTION OF HARRIS TRUCK LINES, INC. V. CHERRY MEAT PACKERS, INC., 371 U.S. 215 (1962), AND THOMPSON V. IMMIGRATION AND NATURALIZATION SERVICE, 375 U.S. 384 (1964), PURSUANT TO WHICH AN UNTIMELY APPEAL WILL NOT BE DISMISSED IF THE FAILURE TIMELY TO FILE THE NOTICE OF APPEAL IS DUE TO RELIANCE ON ACTION TAKEN BY THE DISTRICT COURT WHICH GENERATES A REASONABLE BELIEF THAT AN APPEAL MAY PROPERLY BE INITIATED AT A LATER DATE.

The Petitioner asserts error by the Fifth Circuit in refusing to grant her relief under the "unique circumstances" rule of Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., supra, and Thompson v. Immigration and Naturalization Service, supra, pursuant to which an appellate court is permitted to assume jurisdiction of an untimely appeal when, due to "unique circumstances," it would be unfair to dismiss that appeal. Those "unique circumstances" which justify the failure timely to file an appeal must take the form of some action or conduct by the district court which is reasonably relied upon by the appellant in failing timely to file the notice of appeal. Thus, in Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., supra, the district court, after making a finding of excusable neglect, granted a timely-

filed motion for an extension of time to file the appeal. The appellate court reversed, finding no adequate showing of excusable neglect, and therefore, dismissing the appeal as untimely. Because the appellant failed to file a timely appeal in reliance on the district court's affirmative granting of the extension, these unique circumstances permitted the appellate court to entertain the late-filed appeal. See National Industries, Inc. v. Republic National Life Ins. Co., 677 F.2d 1258, 1264 (9th Cir. 1982).

In Thompson v. Immigration and Naturalization Service, supra, the unique circumstances consisted of the trial court's affirmative statement that appellant's motion for new trial was timely made, thus reasonably leading appellant to believe that motion tolled the time for filing the notice of

appeal. The district court in Needham v. White Laboratories, Inc., 639 F.2d at 398, created unique circumstances justifying the untimely appeal by orally assuring the appellant at a hearing in open court that his post-trial motion tolled the appeal time. In Chipser v. Kholmeyer & Co., 600 F.2d 1061 (5th Cir. 1979), unique circumstances existed because appellant relied in good faith on the district court's statements concerning the granting of a new trial.

In each of these cases some affirmative action taken by the district court clearly indicated that court's intention to permit an extension of time to file the appeal. As a simple reading of the Fifth Circuit's decision in this case reveals, that Court correctly articulated and applied the unique circumstances test established in these earlier cases.

Petitioner initially misstates the Fifth Circuit's holding with respect to the "unique circumstances" rule. The Fifth Circuit did not hold, as stated by Petitioner, that "unique circumstances" exist only where the appellant, in failing to file a timely appeal, relies on express statements of the district court, as opposed to action or conduct of the district court. Quite the contrary, the Fifth Circuit stated that "unique circumstances" justifying the failure timely to file the appeal are present if

> counsel for the appellant was lulled into the false sense of security that he could delay filing the notice of appeal until after the time prescribed by the applicable rules because of the extension of time granted by the [district] court. In [Harris Truck Line, Inc. v. Cherry Meat Packers, Inc., supra, and Thompson v. Immigration and Naturalization Service, supra], the appellant was misled by the words or conduct of the trial court into

> believing that the time for appeal was extended beyond that prescribed by the applicable rules.

Alvestad v. Monsanto Company, 671 F.2d at 910, quoting from Hernandez-Rivera v. Immigration & Naturalization Service, 630 F.2d 1352, 1355 (9th Cir. 1980) (emphasis added). The Fifth Circuit characterized its previous applications of the "unique circumstances" rule as situations in which "the words or actions of the district court clearly misled the aggrieved party into believing that the filing of an appeal within the thirty-day deadline was unnecessary." Alvestad v. Monsanto Company, 671 F.2d at 911 (emphasis added). But see Needham v. White Laboratories, Inc., 102 S.Ct. at 429 (in dissenting from the denial of certiorari, Justice Rehnquist states that as a prerequisite for application of the "unique circum-

stances" rule, the appellant "must rely on a statement by the District Court"). Neither in its articulation of the "unique circumstances" standard nor in its application of that test did the Fifth Circuit indicate that it required an express statement by the District Court as opposed to any conduct of that Court which may have justifiably led Petitioner to believe an appeal might properly be initiated after the statutory time for appeal had expired.

On the other hand, the Fifth Circuit did require that, in order to invoke the "unique circumstances" exception, Petitioner must show some affirmative action, conduct or statement by the District Court which clearly could have reasonably misled Petitioner, causing her to fail to file a timely appeal. As the Fifth Circuit correctly concluded, there simply was no such

affirmative action, conduct or statement by the District Court in this case on which Petitioner was entitled justifiably to rely in failing to file a timely appeal.

The Fifth Circuit noted that the mere willingness of the District Court to hear the merits of the late-filed post-trial motion is not necessarily reasonable grounds for the appellant's failure to file a timely appeal. Alvestad v. Monsanto Co., 671 F.2d at 911 n.1; Gribble v. Harris, 625 F.2d 1173 (5th Cir. 1980). The decisions relied upon by Petitioner for the proposition that the district court's willingness to hear the merits of a tardy post-trial motion is reasonably relied upon by the appellant in failing to file a timely appeal, Pierre v. Jordan, 333 F.2d 951 (9th Cir.), cert. denied, 379 U.S. 974 (1964), and Vine v.

Beneficial Finance Co., 374 F.2d 627 (2d Cir.), cert. denied, 389 U.S. 970 (1967), are distinguishable. Unlike the circumstances in those decisions, the District Court in this case in hearing the merits of the late-filed post-trial motion expressly recognized that the time for filing a motion for appeal would run on the next day after that hearing, i.e., the thirtieth day after entry of the Final Judgment. As the Fifth Circuit accurately noted, that statement by the District Court rendered unreasonable any reliance by Petitioner on the District Court's hearing of the motion on the merits as a ruling that the motion would be deemed timely to toll the time for filing the notice of appeal.

The Fifth Circuit properly held that the District Court's comments and actions in this case "clearly stopped

short of assuring the Petitioner that her post-trial motion was timely filed, thus tolling the time to file an appeal, or that the District Court was granting an extension of time to file the appeal notice." Alvestad v. Monsanto Company, 671 F.2d at 911. Indeed, the District Court's comments, as described by the Petitioner, carried just the opposite message, i.e., the time to file the notice of appeal would run on the thirtieth day because the Petitioner's post-trial motion was untimely and the District Court had granted no extension of time to file the notice of appeal.

If the unique circumstances exception is not to render meaningless Rule 4, Fed.R.App.P., requiring timely filing of the notice of appeal, that exception must be applied only where the district court's conduct was clearly misleading and appellant's reliance on

that conduct was clearly reasonable. As Justice Rehnquist recognized in his dissent from the denial of certiorari in Needham v. White Laboratories, Inc.:

> Although it is unfortunate that [the Petitioner] may have been misled by the District Court, a litigant is bound by the rules of procedure, just as he is by the rules of substantive law. A litigant is no more entitled to conclusively rely on a District Court's view of a rule of procedure than he is as to its view on matters of substantive law.

102 S.Ct. at 430.

The Petitioner was manifestly bound by the rules of procedure with respect to the requirement of timely filing of the notice of appeal. The 1979 amendments to Rule 4, Fed.R.App.P., emphasize the importance of strict adherence to the statutory time period, while providing certain mechanisms to extend that period. Petitioner in this case ignored all the available statutory mechanisms

to obtain an extension of the appeal period. She now seeks to attribute her error in failing to follow the statutory procedural rules to the District Court's actions, conduct or statements. However, no actions, conduct or statements of the District Court reasonably misled the Petitioner with respect to her failure timely to file a notice of appeal. Instead, this case involves a simple failure by the Petitioner to take the procedural steps necessary to establish the appellate court's jurisdiction. The Fifth Circuit was not obliged to take the District Court to task for the Petitioner's failure to comply with those procedural prerequisites.

III.

THE FIFTH CIRCUIT, IN ITS REVIEW OF THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION FOR RECONSIDERATION UNDER RULE 60(b), FEDERAL RULES OF CIVIL PROCEDURE, PROPERLY ARTICULATED AND APPLIED THE ABUSE OF DISCRETION STANDARD OF REVIEW IN UPHOLDING THE DISTRICT COURT'S DENIAL OF THAT MOTION FOR RECONSIDERATION.

Petitioner also asserts as error the Fifth Circuit's articulation and application of the abuse of discretion standard applicable to its review of the District Court's denial of the Petitioner's Rule 60(b) Motion for Reconsideration.[4/]

Although Petitioner assigns as error the Fifth Circuit's failure to apply the "slight abuse" of discretion standard applicable where the district court's denial of Rule 60(b) relief precludes examination of the full merits of the cause, the Fifth Circuit's opinion expressly cites the decision articulating that precise standard,

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[4/] Although the Petitioner's appeal from the Final Judgment was dismissed as untimely, the notice of appeal was timely filed with respect to the District Court's denial of Petitioner's Rule 60(b) Motion for Reconsideration. Therefore, the Fifth Circuit did review the order of the District Court of September 22, denying Petitioner's Motion for Reconsideration.

Seven Elves, Inc. v. Eskenazi, 635 F.2d 396 (5th Cir. 1981). Once again it appears that Petitioner's complaint involves not the articulation of the applicable standard but her disagreement with the Fifth Circuit's application of the standard to these facts. Asserting a number of "mistakes" or errors of law, Petitioner contends that the District Court abused its discretion by not granting relief under Rule 60(b)(1) to correct a "mistake," under Rule 60(b)(4) because the judgment is void, or under Rule 60(b)(6) for any "other reason" justifying relief. Rule 60(b), Fed.R. Civ.P.

The Fifth Circuit accurately characterized the errors cited by the Petitioner as the type normally raised and corrected by way of a timely appeal from the district court's Final Judgment. It is clear beyond cavil that

Rule 60(b) is not intended to substitute for the normal procedure of appeal. Fackelman v. Bell, 564 F.2d 734 (5th Cir. 1977). A Rule 60(b) motion can be made at "any reasonable time," and as long as a year or more after the entry of the final judgment. Because it runs contrary to the concept of finality of judgments, Fackelman v. Bell, supra, Rule 60(b) should not be expansively construed.

On review of the district court's refusal to grant Rule 60(b) relief, the issue is not the accuracy of the underlying judgment, but whether the district court abused its discretion in ruling that insufficient grounds for disturbing the finality of the judgment were not shown in a timely manner. Brennan v. Medwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971). Consequently, alleged errors of law by the district

court, such as the improper application of the forum non conveniens doctrine, are not properly susceptible of correction by a Rule 60(b) motion, but only by a timely-filed appeal. Silk v. Sandoval, 435 F.2d 1266 (1st Cir. 1971); Swam v. United States, 327 F.2d 431 (7th Cir.), cert. denied, 379 U.S. 852 (1964); Fox v. Brewer, 620 F.2d 177 (8th Cir. 1980). Although some appellate courts have permitted the district court to use Rule 60(b) relief to correct an error of law which is clear on the face of the record, such as an error involving a plain misreading of a statute, Meadows v. Cohen, 409 F.2d 750 (5th Cir. 1969), Compton v. Alton S.S. Co., 608 F.2d 96 (4th Cir. 1979), such a reopening of the judgment on the basis of an error of law is certainly not mandatory. Fackelman v. Bell, supra. The district court's refusal to reopen the judgment to

correct such errors does not constitute an abuse of its discretion. Id.

Petitioner argues that the District Court should have found the Final Judgment "void," and therefore, granted relief under Rule 60(b)(4) because the District Court failed to give notice to Petitioner before ruling on the various Motions to Dismiss and for Summary Judgment. Although the failure to give the required notice may be a serious procedural irregularity, as Professor Moore has recognized with respect to the failure to give notice before entering a default judgment,

> that error should not usually be treated as so serious as to render the judgment void. It should be considered in light of surrounding circumstances and will, at times, be harmless.

7 Moore's Federal Practice ¶ 60.25[2], at 311 (2d ed. 1982). In this instance, the failure to give that notice may well

have been harmless error. The various motions to dismiss and/or for summary judgment had been pending for several years. Nevertheless, Petitioner had failed to file any response addressing the merits of those motions. Furthermore, the facts on which turned the issues of law in this case, choice of law and forum non conveniens, were largely undisputed or were already a matter of record by way of pleadings, affidavit or answers to interrogatories. Thus, the failure to give notice in this case is hardly an error of sufficient dimension to render the judgment void.

Although the Petitioner cites as error the District Court's cutting off of discovery by its failure to compel answers to interrogatories, that error is insufficient to warrant any finding of abuse of discretion in failing to

grant Rule 60(b) relief. In fact, many interrogatories were answered by certain of the Respondents and by the Petitioner. The facts crucial to the District Court's decision on forum non conveniens and choice of law were largely already established at the time of the District Court's ruling. As the District Court noted in denying Rule 60(b) relief, additional discovery would not have enabled Petitioner to prevail on these questions of law in any event.

Petitioner erroneously cites as error the District Court's failure to require affidavits in support of the Respondents' summary judgment motions. At least one such affidavit was filed.[5/]

[5/] An affidavit was attached to the Memorandum filed in July, 1980 in support of Respondent Monsanto Company's January, 1980 Motion to Dismiss. That affidavit had also been attached to the previously filed "premature" Motion for Summary Judgment filed by the same Respondent in March, 1978.

In any event, summary judgment may properly be granted based alternatively on the pleadings and the answers to interrogatories filed in this case. Although a variety of methods of proof may be used on a motion for summary judgment, including affidavits, "[n]o one method of proof is required; and one or more [methods] in varying combinations may be used." 6 Moore's Federal Practice ¶ 56.23, at 56-1388 (2d ed. 1978). The cases cited by Petitioner simply do not require the filing of affidavits as the sole method of proof in support of the motion for summary judgment. Indeed, the plain language of Federal Rule of Civil Procedure 56(b) states that a defending party may "move with or without supporting affidavits for a summary judgment . . . ." Rule 56(b), Fed.R.Civ.P. (emphasis added).

It is, therefore, clear that the mistakes alleged by Petitioner are not of a nature which would entitle her to relief despite her failure timely to file an appeal. The Fifth Circuit properly found no abuse of discretion in the District Court's refusal to grant Petitioner relief from the Final Judgment without a proper appeal.

CONCLUSION

Although the Petition contains elaborate exhortations concerning due process violations and alleged denial to Petitioner of her day in court, an analysis of the issues presented by the Petition for Writ of Certiorari plainly illustrates that no such violations occurred in this case. Rather, this case involves a failure by Petitioner to abide by the procedural requirements for a proper appeal and, having committed

that procedural error, her attempts to escape the consequences of that error.

As the Statement of Questions Presented and Reasons Why the Writ Should Be Denied make clear, with respect to each issue which Petitioner has presented to this Court for it possible review, the Fifth Circuit's decision correctly applied the appropriate legal standard to the facts of this case, fully considering and correctly deciding that issue. The Fifth Circuit's decision in this case is contrary to no decision of this Court. It is not at variance with any authority from other Circuits. The cases cited by Petitioner are, in some instances distinguishable, and in other instances, have simply been overruled by subsequent case law. Each of Petitioner's contentions concerning alleged errors by the Fifth Circuit is wholly lacking in

merit. Furthermore, the contentions and issues put forward by Petitioner are most certainly not of sufficient significance to merit review by this Court.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Original Signed by
Eugene J. Silva

Eugene J. Silva
Attorney in Charge for
Respondent MONSANTO
COMPANY
2600 First City Tower
Houston, Texas 77002
713/651-2014

OF COUNSEL:

VINSON & ELKINS
First City Tower
Houston, Texas 77002
713/651-2222

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of Respondent Monsanto Company's Brief in Opposition to the Petition for Writ of Certiorari have been duly and properly delivered to Petitioner's counsel, Mr. Benton Musslewhite, Law Offices of Benton Musslewhite, Inc., 609 Fannin, Suite 517, Houston, Texas 77002, by hand-delivering same and/or by U.S. certified mail, return receipt requested, this the 15 day of October, 1982.

Original Signed by
Eugene J. Silva

Eugene J. Silva